No. 87 - 7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

FREDRIC E. and ADRIAN MICHELS;
ROBERT and TERESA KLEIN;
RICHARD and PAMELA RECEVEUR and
McKINLEY and WILMA THURMAN - - Petitioners

versus

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.;
STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.;
LOUISVILLE GAS & ELECTRIC COMPANY and
SOUTH CENTRAL BELL TELEPHONE COMPANY - - - - - - - Respondents

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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(See inside cover for certification)

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CERTIFICATE OF SERVICE

It is hereby certified pursuant to Supreme Court Rule 28 that three copies hereof were mailed, first class mail, postage prepaid, this 26 day of June, 1987, to Mr. David Armstrong, Office of Attorney General, Capitol Building, Frankfort, Kentucky 40601, and to the following counsel of record: Mr. Marvin J. Hirn, 3300 First National Tower, Louisville, Kentucky 40202, Counsel for Times Mirror; Mr. John Bilby, 2500 Brown & Williamson Tower, Louisville, Kentucky 40202, Counsel for LG&E; Mr. Laurence J. Zielke, Mr. Michael Lowe, 450 S. Third Street, Louisville, KY 40202, Counsel for Storer; Mr. James Harralson, South Central Bell, P. O. Box 32410, Louisville, KY 40202, Counsel for Bell.

NICHOLAS W. CARLIN
Counsel for Petitioners

QUESTIONS PRESENTED

I. Did the Petitioners consent to the placement of CATV distribution cable on their land when they timely objected to trespass within the Statute of Limitations?

II. Are electric and telephone easements unilaterally apportionable to new uses or new users such as CATV?

III. Is CATV a utility?

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IN THE

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October Term, 1987

FREDRIC E. MICHELS, Et Al. - - *Petitioners*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC., Et Al. - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioners respectfully pray that a Writ of Certiorari issue to review the opinion of the Supreme Court of Kentucky rendered on January 22, 1987.

OPINION BELOW

The opinion of the Supreme Court of Kentucky was decided and filed on January 22, 1987 (Appendix A), which the Supreme Court of Kentucky determined "should not be published". A petition for rehearing, and/or modification and extension of opinion was filed. The order of the Supreme Court of Kentucky denying that petition was entered on April 30, 1987 (Appendix B).

JURISDICTION

The opinion of the Supreme Court of Kentucky (Appendix A) was decided and filed on January 22, 1987; and a timely petition for rehearing, and/or modification and extension of opinion was denied by order

of the Supreme Court of Kentucky (Appendix B) on April 30, 1987. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 2101 (c) and Rule 20.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions

The United States Constitution, Article I, Section 10 (1) states: "No state shall . . . pass any . . . ex post facto law, or law impairing the obligation of contracts . . ."

The Fifth Amendment to the United States Constitution provides: ". . . nor shall private property be taken for public use, without just compensation."

Statutory Provisions

47 U.S.C. 541 (a) (2) states "any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure —

> c. that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator."

47 U.S.C. 541 (3) (c) states "Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

Kentucky Revised Statute 278.040 (2), states: "The jurisdiction of the Commission shall extend to all utilities in this state. The Commission shall have exclusive jurisdiction over the regulation of rates and service of utilities . . ."

STATEMENT OF THE CASE

The petitioners seek damages against an electric company, a telephone company and two cable television companies for trespass to land by the location of overhead CATV distribution cable and a CATV guy wire on the property of Petitioners in public utility easements without their permission, or payment of just compensation, for this taking of interests in land. The parties filed cross-motions for summary judgment and scheduled briefs thereon in the trial court. The main issue of Petitioners was that their easements were interests in land not apportionable to new uses or new users such as CATV. The Respondents' defenses were that the easements were apportionable and that Petitioners had consented to use of their easements by later subscription to CATV services. Petitioners' reply briefs in the trial court strongly argued that CATV and utility Respondents were guilty of fraudulent concealment of their duty to disclose to landowners the question of trespass and landowner permission for use—thus negating consent.

The Court of Appeals of Kentucky declined to comment on the lower court's opinion and ruled that the electric and telephone easements were apportion-

able to CATV use without compensation. That Court further found that CATV was a utility, contrary to a determination of the Public Service Commission of Kentucky that it was not.

The Supreme Court of Kentucky then declined to comment on the opinion of the Kentucky Court of Appeals and by a four vote majority found for Respondents on the basis of implied consent of the landowners to the use of their land by CATV. One Justice concurred in result only and stated that he would not find implied consent, but would find the easements apportionable and would find CATV to be a utility. Another Justice held for the Petitioners on the basis that fraudulent concealment was present vitiating implied consent. He stated he would find for Petitioners, implying that utility easements are not apportionable.

On Movants' Petition for Rehearing and/or Modification and Extension of Opinion, they argued to the Supreme Court of Kentucky the issue of fraudulent concealment and cited *Edelman* v. *Jordan,* 415 U. S. 651, 94 S. Ct. 1346, 39 L. Ed. 2d 662, *Lloyd Corp., Ltd.* v. *Tanner,* 407 U. S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972), *Brady* v. *U. S.,* 397 U. S. 742, 25 L. Ed. 2d 747, 90 S. Ct. 1463, *In Re Bryan,* 645 F. 2d 331 (1981), *U. S.* v. *Fong,* 529 F. 2d 55 (1975), and *Rivera* v. *Marcus,* 696 F. 2d 1016 (1982), to show that it was a violation of their Fifth Amendment Constitutional rights for that Court to find implied consent by them.

This suit is a potential class action, which, pursuant to a house to house survey, directed by counsel,

Nicholas W. Carlin, in Jefferson County, Kentucky, directly affects 31,000 single family dwelling owners by trespass, half of whom do not subscribe to cable t.v. This number excludes approximately 181,000 dwellings where the CATV cable locations are in road rights-of-way and other public areas not involved in easements over private land. The decision of the Supreme Court of Kentucky basing its decision on consent, fails to resolve the rights of the owners who do not subscribe to cable television services.

CATV cable is thick, located low on the pole, is unsightly, and causes damages. The holdings of *Loretto* v. *Teleprompter Manhattan CATV Corp.,* 102 S. Ct. 3164, 458 U. S. 419, 73 L. Ed. 2d 868, and *Consolidated Cable Utilities, Inc.* v. *City of Aurora* (Ill.) 439 N. E. 2d 1272 (1982) prohibit this taking of interests in land.

CATV distribution cable, whether overhead or underground, requires a continuous connection over a mileage of realty plots, without a break in the cable linkage. It passes over an owners' property in a public utility easement and on to other property whether or not that individual owner subscribes to CATV services. Distribution cable is distinguished from the "drop line" which is the smaller line which connects the distribution cable to an individual home to provide CATV service.

These easements, at earlier dates, were obtained by consent, negotiated payment, or condemnation for public utility purposes. An easement document, like a contract, contains rights and responsibilities which

flow from the utility to the landowner, and vise versa. Few easement documents authorize the utility owner to apportion these easements to new uses and new users. Some easements are obtained from real estate developers through local government planning and zoning commissions, and are reflected on subdivision plats which affect many dozens of homes at the same time. That is the case of the easements involving petitioners. Their easement language is minimal and is found on a legend on the subdivision plat. There is no language granting the utility power to apportion easements.

The two CATV Respondents had local government franchises to provide CATV service in this community, but these franchises are subordinate to Petitioners' constitutional rights to protect their realty interests. The decision of the Supreme Court of Kentucky results in a taking of interests in private land without compensation, in violation of the United States Constitution, Fifth Amendment, and impairs the obligations of contract, to wit, easement agreements, under the United States Constitution, Article I, Section 10 (1).

The issue of whether utility easements are apportionable to new uses and new users such as CATV, without compensation to landowners, is of great importance to Kentuckians and landowners throughout the United States. The Court of Appeals of Kentucky stated that this issue was of "unusual significance". This Court has indicated a healthy respect for landowner rights in *Loretto* v. *Teleprompter, supra* and in

the June, 1987 decision concerning the Lutherglen Campground.

This Court granted certiorari in *City of Los Angeles* v. *Preferred Communications, Inc.*, (Cal) 106 S. Ct. 2034, 90 L. Ed. 2d 480, and over objections of all counsel, granted counsel for the present Petitioners, Nicholas W. Carlin, permission to file a brief Amicus Curiae, which brief was filed. That Amicus brief generally raises serious issues concerning landowner property rights and trespass. The issues raised in that amicu brief and this Petition are not resolved. This court remanded *City of Los Angeles* v. *Preferred Communications, Inc.* to the U. S. District Court in Califarnia to develop guidelines to balance the regulatory interests of municipalities against the First Amendment rights of cable television operators.

REASONS FOR GRANTING THE WRIT

I. The Petitioners Did Not Consent to the Placement of CATV Distribution Cable on Their Land When They Timely Objected to Trespass Within the Statute of Limitations.

The Petitioners were not aware of their rights against trespass until they raised those rights, and when they raised those rights, they did so well within the Statute of Limitations for trespass to land under Kentucky law. Further, they were mislead as to their rights, due to fraudulent concealment by the CATV defendants, see dissenting opinion of Justice Wintersheimer in the opinion of January 22, 1987, by the Supreme Court of Kentucky (Appendix A, pps. 8a-11a).

The City of Louisville and Jefferson Fiscal Court and by and large, the governments of municipalities and landowners in other states have been kept in the dark about their rights to permit or deny CATV takings of interests in land. Only now are these issues beginning to appear in appeal court opinions in states such as Illinois and California.

U. S. Supreme Court decisions hold that implied consent to waive a constitutional right cannot be lightly implied. In *Edelman* v. *Jordan, supra,* Justice Rehnquist wrote the court's opinion that constructive consent is not a doctrine commonly considered with the surrendering of constitutional rights. He stated that since the Court was dealing with a constitutional question, it was less constrained by the principal of stare decisis than it would be in other areas of the law. That case involved the arguable consent to sue by a state for violating federal regulations on administration of a federal aid program to the aged within individual states.

In *Lloyd Corp., Ltd.* v. *Tanner, supra,* Justice Powell in the majority opinion held that Fifth and Fourteenth Amendment rights of private property owners as well as First Amendment rights of all citizens must be respected and protected. That case involved the conflict of First Amendment free speech rights of a pamphleteer on private shopping center property. The opinion stated that there had been no such dedication of the owner's private shopping center to public use as to entitle Respondent to exercise his First Amendment rights, and found trespass. Justice

Powell stated that property does not lose its private character merely because the public is generally invited to use it for designated purposes. By analogy, Movants' property has a private character which has not been lost just because easements on it are dedicated to electric and telephone purposes.

In *Brady* v. *U. S., supra,* Justice White stated the majority opinion that waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. The facts of this case as developed in 36 depositions and 7,000 pages of transcript clearly show Movants' denial of such knowledge and a demonstration of many acts of non-disclosure and concealment by Respondents and some positive acts of mis-direction such as misquotation of law on the Storer doorhangers and the acts of Times Mirror in paying forms of compensation for permission and silence from objecting homeowners.

In *In Re Bryan, supra,* the Court held that "purported waivers of fundamental constitutional guarantees are subject to the most stringent scrutiny." The Court stated, "because of far-reaching consequences involved in waiver of basic rights, courts indulge every reasonable presumption against waiver . . ." That Court cited *Brady, supra,* in support.

In *U. S.* v. *Fong, supra,* the Court put all constitutional rights on the same level of importance in making legal and factual determinations about waiver. The Court stated that "whether a defendant understood his rights and whether he knowingly and voluntarily

waived them, is in the first instance a question of fact to be determined from all circumstances. The test for determining competent and intelligent waiver is the same regardless of which constitutional right is being waived." Petitioners contend that they have the right to protect their property under the Fifth Amendment of the United States Constitution. They contend that not all facts of fraudulent misrepresentation were considered by the court against the CATV Respondents and some facts were misconstrued. The license agreements among the Respondents were non-public. The license agreement between Bell and Storer shows in paragraph 2 that Storer was responsible for getting and necessary permission for attachments from landowners. Paragraph 16 makes it clear that the agreement does not grant an easement to Storer.

The opinion of the Supreme Court of Kentucky seems to give weight to the fact that Movants signed agreements for the attachment of drop line connections for subscription to CATV. Those agreements do not in any way discuss or seek consent or permission of subscribers to the prior installation of distribution equipment including distribution cable on their land. What they do permit is the attachment of a drop line to the distribution cable and the further connections required to provide CATV service. The acceptance of CATV service by a user does not imply acquiescence to trespass.

In *Rivera* v. *Marcus, supra,* the Court held that "half sister, who had liberty interest in preserving familial relationship with her half brother and sister,

did not waive any of her constitutional rights by entering into foster care agreement with state welfare department, even though agreement authorized state to remove children from foster home at any time, where there was no evidence that half sister intentionally and intelligently waived her due process rights when she signed the agreement or that state informed her of legal implications of her decision." In this case, the Movants did not waive their Fifth Amendment constitutional rights by signing the agreements pertaining to CATV services.

The majority opinion appears to find that *Bradford* v. *Clifton,* Ky., 379 S. W. 2d 249 (1964), is conclusive against Petitioners on the issue of consent. It is requested that this Court reconsider that holding in relation to *Satin* v. *Hialeah Race Course, Inc.,* Fla., 65 So. 2d 475 (1953). Petitioners contend that *Satin, supra,* applies to the facts of this case and *Bradford, supra,* does not. *Satin,* held that "a conditional or restrictive consent to enter land creates a privilege to do so only insofar as the condition or restriction is complied with, and that consent is restricted to provisions affecting its exercise." The Court found that rules of the race course provided that press pass would not be used by non-press members, that a party gained entrance by mis-representing that she was a press member, and that she was, therefore, only a licensee, if not a trespasser. The press pass was used in an unauthorized way much as Movants contend their easements were used improperly by LG&E and Bell as well as, by the CATV Respondents.

II. Electric and Telephone Easements Are Not Unilaterally Apportionable to New Uses and New Users Such as CATV.

Easements should be interpreted by the words stated, and the intentions of the parties to those easements. *Thomas* v. *Ross,* R.I., 376 A. 2d holds at pp. 1370-71, that where language reserving an easement is not reasonably susceptible to more than one interpretation, and there is no showing that it should be read in any but its ordinary sense, then the language will be read in that ordinary sense. It states that a Court should seek only the intention expressed and not undetermined intentions. *Lindhorst* v. *Wright,* Okla., 616 P. 2d at 453 (1-3) interprets an easement in the same manner as a written contract—since no ambiguity exists in the language used, intention is determined from the words used. It also states that the express language of a contract controls the extent and scope of an easement.

A franchise is subordinate to private rights. In *City of St. Louis* v. *Western Union Telegraph,* 37 L. Ed. 38, 13 S. Ct. 485, 148 U. S. 92, a telegraph company attempted to use existing utility poles without payment, relying on a post-road act. *St. Louis* holds at 37 L. Ed. 386 that a franchise does not carry with it the unrestricted rights to appropriate the public property and states that like any other franchise it must be exercised in subordination to public *as to private rights* (emphasis added). It states at 384, "no one would suppose that a franchise from the federal government to a corporation . . . to construct . . . lines of . . . com-

munication, would authcrize it to enter upon private property of an individual and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation . . ." This case supports Petitioner's stance that a "taking" is occurring and that a franchise cannot validate that taking.

Loretto v. *Teleprompter Manhattan CATV Corp., supra,* holds that CATV attachments, though small in size and aggravation, are an unconstitutional taking of a realty owner's interest in land without compensation. The case rejects the concept of public interest in CATV, strongly supports the landowner's rights against such intrusion, and finds that the intrusion causes damages. *Loretto, supra,* at 73 L. Ed. 2d 81 considers easements by stating, ". . . and even if the government physically invades only an easement in property, it must nonetheless pay compensation . . ." citing *Kaiser Aetna* v. *United States,* 444 U. S. at p. 181.

Landowners in several states have sought injunction to stop the location of CATV cable on their property. Courts have held for CATV in most of these cases, citing the public interest in CATV and in some cases finding the underlying easements to be apportionable. Such cases are *Hoffman* v. *Capitol Cable Television System, Inc.,* 386 N.Y.S. 2d 385, *Jolliff* v. *Hardin Cable Television Co.,* 269 N. E. 2d 588 and *Croley* v. *New York Telephone Co.* and *Cablevision, Inc.,* 363 N.Y.S. 2d 292. In those cases, the underlying ease-

ments contained words of assignability and leaseability. *Hoffman* found for the CATV defendant on the basis of the public interest in CATV, but also recognized that harm may have been done to private realty by the placement of CATV cable. In the same time period, prior to the United States Supreme Court holding of *Loretto* v. *Teleprompter Manhattan CATV Corp., supra,* the New York Court also found for Teleprompter in *Loretto* v. *Teleprompter Manhattan CATV Corp.,* 440 N.Y.S. 2d 843, on the basis of public interest in CATV. *Croley* also found for CATV, but that was because the cable company was incorporated as a public utility, and the specific easement language was broad and provided the company a right to permit attachment of communication . . . wires and facilities of *other public utility companies* (emphasis added) and to convey to such other companies interests and rights granted under the easements.

Factually close to the *Croley* easement language is the *Jolliff* easement where the Plaintiff clearly contracted for expanded uses like CATV in the terms of his easement. The easement language specifically provides for assignees, lessees, and tenants of both the electric and telephone company.

Petitioners agree that the *Croley* and *Jolliff* easements are apportionable because the plaintiffs contracted to allow the type of activity that occurred by agreeing to the easement language. However, that easement language is not typical.

None of these New York decisions or other state court decisions gushing over the public interest in

CATV reflect the present law. The United States Supreme Court in *Loretto, supra,* changed the stare decisis of these holdings and made it extremely clear that the "public interest" in cable television, is not a match for the private rights of landowners even when the damages are small.

III. CATV Is Not a Utility.

The Public Service Commission, pursuant to K.R.S. 278.040(2) has exclusive jurisdiction over the regulation of rates and services of utilities. Rulings of the Public Service Commission clearly show that CATV is not a utility. Several years ago, CATV operators initiated hearings before the PSC seeking to be declared utilities. However, they were declared by the PSC to not be utilities—just customers.

47 U.S.C. 541(c) states, "any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."

To have the status of a public utility, the activity performed should be an essential public service. *Devon-Aire Villas Homeowners Association, No. 4, Inc.* v. *Americable Associates,* Fla., 34 Dist. Ct. App. No. 84-675 (1985), held that CATV is not a public utility and that its entry upon platted public utility easements to install underground CATV cable is a trespass. In *Americable* the Court stated,

> "... we do not believe that the value and necessity of cable television is so self-evident that this court should arrogantly declare this newest rage of the media world to be the equivalent of, for example,

> electricity and water. As the Court in *Teleprompter* v. *Hawkins* observed in a different context, if cable television is so vested with a public interest as to justify public regulation and control, that is a matter for determination by the state legislature, 384 So. 2d at 650. Similarly it seems to us that if cable television is so vested with the public interest as to give it the right to use easements on private lands dedicated for public utility use only, the legislature, rather than this court, should say so . . ."

Americable states: "That 'public utility' eludes precise definition; and that examination of statutes and case law persuades that a public utility is a creature of statute impressed with a public use, which provides services generally considered essential, and enjoys certain power usually reserved to the sovereign; and concludes that cable television is not a public utility."

Public utilities in Kentucky offer essential and necessary services such as electricity, telephones, gas transmission, and water. Cable television is not essential and does not have the attributes of necessity and importance. Typically, a public utility is rate regulated and otherwise regulated to conform to the public good. This is not so in the case of CATV. Typically, a utility has the power of condemnation. CATV does not.

City of Owensboro v. *McCormick,* Ky., 581 S. W. 2d 3 (1979), holds that governmental compulsion to surrender property must always be accompanied by payment of just compensation. It states that governmental power compelling a citizen to surrender property to

another citizen who will use it predominantly for his own private benefit, just because such alternative private use is thought to be preferable in the subjective notion of governmental authority, is repugnant to constitutional protections whether they be cast in a fundamental fairness component of due process or in the prohibition against exercise of arbitrary power.

Contained in 47 U.S.C. 541 is the statute "that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator." This recognizes that damages occur to owners of property from cable installation. This clause was added to accommodate the mandates of *Loretto* v. *Teleprompter Manhattan CATV Corp., supra* see House of Representatives Report 98-934, pages 80-81, (Appendix D).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certirorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

RENDERED: JANUARY 22, 1987
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

No. 86-SC-123-DG

FREDRIC E. MICHELS, ADRIAN MICHELS, ROBERT KLEIN, TERESA KLEIN, RICHARD RECEVEUR, PAMELA RECEVEUR, MCKINLEY THURMAN, and WILMA THURMAN - - - *Movants*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.; STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.; LOUISVILLE GAS & ELECTRIC COMPANY; and SOUTH CENTRAL BELL TELEPHONE COMPANY - - *Respondents*

On Review from Court of Appeals
No. 85-CA-1081-MR
(Jefferson Circuit Court No. 83-CI-07641)

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The residential property of each of the movants is encumbered by dedication on the subdivision plats or by deeds of dedication with easements for public utility purposes or for electric and telephone service. The respondents, Louisville Gas and Electric Company and South Central Bell Telephone Company have used these easements for the

purpose of installing and maintaining electric and telephone service to customers. These utility companies have permitted the respondents, Times Mirror Cable Television of Louisville, Inc. and Storer Communications of Jefferson County, Inc. to install and maintain an aerial coaxial television cable upon utility poles within the confines of the easements.

There is presently extending across the real property owned by each of the movants upon utility poles within the confines of the easements an aerial coaxial television cable. Each of the movants subscribed to the television cable service, signed an agreement with the cable companies granting their employees access to the property to install and service cable equipment, allowed the cable to remain in place without objection for a substantial period of time, and permitted the installation of a drop line across their property to connect their residences to the coaxial cable.

Each of the movants contend that the easement upon their property was granted for electric and telephone service or for public utility purposes and that the coaxial television cable does not qualify as a beneficiary under the terms of the easement. They contend, therefore, that the television cable constitutes a continuing trespass upon their private property for which they are entitled to damages.

Summary judgment was granted by the trial court to each of the respondents on the ground that the issue was moot as to the movants Michels, and that there was no trespass with respect to the other movants because they impliedly consented to the installation and maintenance of the cable.

The Court of Appeals affirmed the judgment of the trial court, but for a different reason than that given by the trial court, and expressed no opinion on the rationale for the judgment given by the trial court. The Court of Appeals

held that the particular easements in question were susceptible to apportionment to television cable usage, although the instruments creating the easement contained no express language permitting use by television cables.

This court likewise affirms the judgment. We decline, however, to review the question of the apportionability of the easements involved in this case.

A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise. *Restatement of the Law,* Torts 2d, § 329.

Habitual or customary use of property for a particular purpose, without objection from the owner or occupant, may give rise to an implication of consent to such use to the extent that the users have the status of licensees, where such habitual use has existed to the knowledge of the owner and has been accepted or acquiesced in by him. *Bradford* v. *Clifton,* Ky., 379 S. W. 2d 249 (1964).

Consent may be manifested by silence or inaction, and even when there is in fact no consent, the words or actions or inactions of an owner or occupant may, under some circumstances, manifest an apparent consent such as will justify reliance on the apparent consent. *Restatement of the Law,* Torts, 2d, § 892, Comments (a) and (c).

We think it is clear that the movants had no objection to the installation of the cable television equipment when it was installed upon the utility poles within the confines of the easement. They signed an agreement permitting the employees of the cable companies access to their property for the installation and maintenance of the cable equipment, and they further agreed that the cable companies might install an aerial drop line across their property outside the confines of the easement to connect the coaxial cable to their residences.

There are circumstances in which consent becomes irrevocable. *Restatement (Second) Torts,* § 892A(5) (1979). We hold that the general principles of estoppel apply here and that movants are now estopped to contest respondent's use of the easement.

Because the issues in this case can be decided on the consent of the movants, it is unnecessary to discuss the broader question of the apportionability of the easement to cable television usage.

We find no error in the other matters asserted by movants.

The judgment is affirmed.

Stephens, C.J.; Gant; Stephenson; and Lambert, J.J. concur.

Leibson, J., concurs by separate attached opinion. Wintersheimer, J., dissents by separate attached opinion. Vance, J., not sitting.

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RENDERED: JANUARY 22, 1987
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

86-SC-123-DG

FREDRIC E. MICHELS, ADRIAN MICHELS, ROBERT KLEIN, TERESA KLEIN, RICHARD RECEVEUR, PAMELA RECEVEUR, McKINLEY THURMAN, and WILMA THURMAN - - - *Movants*

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On Review from Court of Appeals
No. 85-CA-1081-MR
(Jefferson Circuit Court No. 83-CI-07641)

CONCURRING OPINION BY JUSTICE LEIBSON

I concur in results only.

If there were a continuing trespass, I would have some difficulty with the concept of estoppel.

However, I agree with the Court of Appeals that CATV is in fact a public utility within the contemplation of the easements in question, and that the CATV industry is not deprived of its status simply because utility regulatory agencies of the federal and state governments have declined to regulate it. 47 U.S.C. 541(c); KRS 278.010(4)(5) and .040.

In each of the cases presently involved, the existing public utility easement was sufficient to permit apportionment to accommodate new technology. The apportioned use of the easements by the CATV companies places upon the appellants as owners of the servient estates no additional burdens which should be considered beyond the contemplation of the easements in question.

RENDERED: JANUARY 22, 1987
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

86-SC-123-DG

FREDRIC E. MICHELS, ADRIAN MICHELS, ROBERT KLEIN, TERESA KLEIN, RICHARD RECEVEUR, PAMELA RECEVEUR, McKINLEY THURMAN, and WILMA THURMAN - - - *Appellants*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.; STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.; LOUISVILLE GAS & ELECTRIC COMPANY; and SOUTH CENTRAL BELL TELEPHONE COMPANY - - - *Appellees*

On Review from Court of Appeals
No. 85-CA-1081-MR
(Jefferson Circuit Court No. 83-CI-07641)

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I respectfully dissent.

It is my view that informed consent is a necessary element of the doctrine of equitable estoppel. In my opinion, a person will not be estopped by his acts unless he understands his rights or actively participates or silently acquiesces in conditions operating to deprive him of his rights. Consent, when given, must be with full knowledge of the facts and rights affected. *See Trimble* v. *King,* 131 Ky. 1, 114 S. W. 317 (1908).

Waiver exists only where a party with full knowledge of the material facts does or forbears to do something inconsistent with that right and indicates that knowledge of the existence of the right is a prerequisite to such relinquishment. No one can waive a right which he does not know. *Harris Bros. Construction Co.* v. *Crider,* Ky. 497 S. W. 2d 731 (1973).

The party asserting estoppel must be excusably ignorant of the true facts and change his position to his detriment in reliance on the words or conduct of the other party. *See City of Georgetown* v. *Mulberry,* Ky. 485 S. W. 2d 503 (1972). That case indicates that where there is a duty to speak or act, silence and inaction are factors to be considered. The cable companies had a duty to seek permission from the property owners and their predecessors. It is not clear that any reason exists for them to ignore that duty.

Estoppel was developed to protect rights and not to reward wrongdoers, even if the wrongdoers are innocent of evil intent. *Sueskind* v. *Michael Hardware,* 228 Ky. 780, 15 S. W. 2d 529 (1929). The cable companies had superior knowledge of their legal obligations and duties to obtain permission for use of the easements. They had a duty to disclose to the property owners, and they knew it, as demonstrated in the license agreements between LG&E and Bell Telephone. It would appear that they willfully failed to disclose or seek permission or easement rights from the property owners.

It appears that both cable companies did not change their positions or any of their operating procedures throughout the Louisville and Jefferson county area. Objection by other owners never caused the companies to clarify their legal responsibilities to anyone. It seems unlikely that objections by these landowners would have

changed the companies' policies and approach to installation.

In addition in this case, the Public Service Commission, along with LG&E and Bell Telephone, allowed the cable companies to enter licensing agreements with the utility companies for the use of their poles only with the requirement that the cable companies would obtain any permission or easements necessary from landowners. The cable companies entered on the property knowing that they had acquired a right to use the utility poles only and did not have the authority without permission to use the easement. They should not be able to now claim protection by virtue of estoppel.

The argument that because the property owner subscribes to cable TV he has no right to object to the trespass by the cable companies is without merit. Most property owners desire electricity more than they desire cable, but it is widely recognized that electric utilities must obtain either easement rights by condemnation or permission from the property owners involved. In that instance there is permission granted and if agreed, a payment for the easement right by the electric company to the landowner and continuing monthly payments by the landowner to the utility for electric services. This is an orderly, proper and commonly understood practice. The same should apply here. The landowner was not consulted by either the telephone utility or the cable company about his right to refuse to permit a cable guywire on his property. The license agreement required the cable company to obtain an appropriate easement but that licensed document was not published. Consequently the telephone utility had superior knowledge and a duty to disclose this information to the property owners. This duty arose from its easement.

The guywire on the property was visible, but the legal obligations and weaknesses of the cable company were

not. The failure of the telephone company to disclose to the public, including the property owners, his right to refuse or to permit the guywire and any other cable distribution equipment could be considered to be fraudulent concealment and if that is the case, it negates the defenses of consent, estoppel and waiver.

Reliance on *Bradford* v. *Clifton,* Ky. 379 S. W. 2d 249 (1964) is misplaced. The facts in *Bradford, supra,* are not comparable and the case does not hold that one who has consent for a prior use has consent for new uses. It says only that habitual or customary use of property for a particular purpose without objection from the owner or occupant may give rise to an implication of consent to such use. That does not extend to new uses and new users.

Summary judgment as granted by the trial court is not appropriate in this situation. I would reverse both the Court of Appeals and the trial court.

APPENDIX B

SUPREME COURT OF KENTUCKY

86-SC-123-DG

FREDRIC E. MICHELS, ADRIAN MICHELS, ROBERT KLEIN, TERESA KLEIN, RICHARD RECEVEUR, PAMELA RECEVEUR, MCKINLEY THURMAN, and WILMA THURMAN - - - *Movants*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.; STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.; LOUISVILLE GAS & ELECTRIC COMPANY; and SOUTH CENTRAL BELL TELEPHONE COMPANY - - *Respondents*

On Review from Court of Appeals
No. 85-CA-1081-MR
(Jefferson Circuit Court No. 83-CI-07641)

ORDER DENYING PETITION FOR REHEARING, AND/OR MODIFICATION AND EXTENSION OF OPINION

Movant's Petition for Rehearing, and/or Modification and Extension of Opinion is denied.

All concur. Vance, J., not sitting.

ENTERED: April 30, 1987.

(s) Robert F. Stephens
Chief Justice

APPENDIX C

OPINION RENDERED: JANUARY 31, 1986; 3:00 P.M.
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 85-CA-1081-MR

FREDRIC E. MICHELS, ADRIAN MICHELS; ROBERT AND TERESA KLEIN; RICHARD AND PAMELA RECEVEUR; and MCKINLEY AND WILMA THURMAN - - - - *Appellants*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.; STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.; LOUISVILLE GAS & ELECTRIC COMPANY; and SOUTH CENTRAL BELL TELEPHONE COMPANY - - - *Appellees*

Appeal from Jefferson Circuit Court
Honorable Olga Peers, Judge
Action No. 83-CI-07641

AFFIRMING

* * * * * * *

BEFORE: HOWARD, LESTER and MILLER, Judges.

MILLER, JUDGE. Appellants are residence owners in Jefferson County, Kentucky. Appellees are two cable television companies and two utility companies. The question arises whether cablevision companies, relatively new enterprises, may string their coaxial cables along and across lands by way of traditional utility easements. The use is made with the consent of the other users of the easement—

Louisville Gas and Electric Company and South Central Bell Telephone Company. The question is of considerable significance as many of the utility easements predate the advent of community antenna television (CATV). It is therefore arguable the use of the easement in furtherance of the CATV enterprise, a function not contemplated when the easement was established, is impermissible and consequently a trespass against the owner of the servient estate.

The easements in question, appearing in subdivision plats and deeds of dedication, are as follow:

> The Michels easement reads, "The spaces outlined by dotted lines and marked electric and telephone easements or street lighting easements are hereby reserved for easements for electric and telephone utility purposes. . . ."
>
> The Receveur easement reads, "An easement for public utility purposes is hereby reserved on, over, under and within the strips and spaces upon this plan defined and bounded by broken lines and marked 'public utility easement' including the right of the utility companies to remove and trim trees on said easement. . . ."
>
> The Thurman easement reads, "The spaces outlined by dashed lines and marked 'electric and telephone easement' are hereby reserved as easements for electric and telephone utility purposes, which include: (1) . . . ."
>
> The Klein easement reads, ". . . five foot easement is retained across the rear of each lot for public utility purposes."

Appellants filed their action in trespass and sought to certify as a class all residents of Louisville and Jefferson County similarly situated. CR 23. On defendants' motion,

the trial court granted summary judgment before addressing the class action issue. In defense of appellants' claim, the appellee CATV companies maintained they were entitled to apportioned use of the easement. They variously interposed the defenses of consent, waiver and estoppel based on language in the service contract each subscriber of cable television was required to sign. At least one appellee contended federal law preempted the field and that utility easements, in the nature of those in question, are subjected to CATV usage. U.S. Const., article VI, clause 2; and 47 U.S.C. 541. While we do not find it necessary to address this contention, it is of significant interest and may require determination were the easements not of the type under consideration.

All appellants have subscribed to cable television at one time or another in the past, and at least one appellant indicated he would continue to subscribe to cable television whatever the outcome of this litigation. The trial court's summary judgment was based upon a finding that appellants had impliedly consented to the installation of the aerial coaxial cable. The trial court found consent from the failure of appellants to contest the dropline which runs from the coaxial cable to their respective residences coupled with the agreement each had signed with the cable companies granting its employees free access to their property to install and service cable equipment. The court also ruled that appellants had not demonstrated that they had been injured. We decline to review the soundness of the trial court's rationale for granting summary judgment, but nevertheless affirm the decision under the rule which compels us to do so when the proper result has been reached. *See Kessee* v. *Smith,* 289 Ky. 609, 159 S. W. 2d 56 (1941). It is our view that the easements in question are susceptible to apportionment to CATV usage. This is true notwithstanding some of the easements identify particular utilities

such as telephone and electricity. They are standard easements found throughout this Commonwealth incident to subdivision development. They are not easements appurtenant (*see Buck Creek R.R. Co.* v. *Haws,* 253 Ky. 203, 69 S. W. 2d 333 [1934]), but are in gross because the benefit of the easement does not inure to any specific real property owned by either appellee utility company. *See Inter-County Rural Elec. Coop. Corp.* v. *Reeves,* 294 Ky. 458, 171 S. W. 2d 978 (1943). As easements in gross, we believe they are particularly susceptible to apportionment and consequently available for the use of utilities in general. The CATV industry is a business of public nature having many of the attributes of public utilities. See *City of Owensboro* v. *Top Vision Cable Company of Kentucky,* Ky., 487 S. W. 2d 283 (1972). We conclude CATV is in fact a public utility within contemplation of the easements in question. A public utility is defined in Black's Law Dictionary (5th Ed.) as follows:

> PUBLIC UTILITY. . . . Any agency, instrumentality, business industry or service which is used or conducted in such manner as to affect the community at large, that is which is not limited or restricted to any particular class of the community. [Citations omitted.] The test for determining if a concern is a public utility is whether it has held itself out as ready, able and willing to serve the public. . . . .

We do not find the CATV industry is deprived of its status simply because utility regulatory agencies of the federal and state governments have, in some way, declined to regulate. 47 U.S.C. 541(c); KRS 278.010(4)(5) and .040. We find it has long been a policy in this state that the type of easement in question is not limited to a particular method of use, but are susceptible to uses of contemporary technology. *See Cumberland Tel. & Tel. Co.* v.

Avritt., 120 Ky. 34, 85 S. W. 204 (1905). We do not discern a valid distinction between the apportionment of an easement to accommodate new technology and apportionment to accommodate a new and different innovation conforming to the definition of a utility and adapted to the ordinary ends of same. Indeed, it seems utility easements in the nature of those at hand have as their purpose the accommodation of all similar utilities. It cannot reasonably be assumed that a subdivision development would dedicate land to utility use with a limitation upon the type of service to be rendered. In this regard, we believe the identification of utilities, such as electric and telephone, was not intended to exclude those utilities requiring compatible installations such as CATV. Generally, we think it is not the function of the utility, but rather the physical nature of its installations which determines whether it conforms to the easement grant. The fact is, the apportioned use of the easements by the CATV companies places no additional burdens upon the appellants as owners of the servient estates. In absence of additional servitude, there can be, of course, no trespass.

Other jurisdictions which have addressed the issue have reached a similar result. *See Salvaty* v. *Falcon Cable Tel.*, __ Cal. App. 3d Supp. __, 212 Cal. Rptr. 31 (Cal. App., Dist. 1985); *White* v. *City of Ann Arbor*, 406 Mich. 554, 281 N. W. 2d 283 (1979); *Staminski* v. *Romeo*, 62 Misc. 2d 1051, 310 N.Y.S. 2d 169 (1979); *Clark* v. *El Paso Cablevision, Inc.*, 475 S. W. 2d 575 (Tex. Civ. App. 1971). Appellants' heavy reliance upon *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) is misplaced. In *Loretto*, the State of New York had passed a statute which dictated that a landlord must permit cable television companies to install cable facilities upon his property. The landlord was to be compensated at a sum fixed by a state commission. The case did not involve an interpretation of easement law. The Court concluded that

the state authorization of the installation of cable equipment in the manner prescribed constituted an unauthorized taking of property within the meaning of the Fifth Amendment. Therefore, the statute was held void.

Finally, upon careful analysis of the myriad facts and details contained in the record before us, we must conclude that the apportioned use of the traditional utility easements at hand lies not only within the direct scope and purpose of the easement, but is well supported by authority as to the manner and use of easements. *See generally*, 25 Am. Jur. 2d *Easements and Licenses*, § 72 et seq. (1966).

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

All Concur.

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APPENDIX D

HOUSE OF REPRESENTATIVES
98TH CONGRESS, 2d SESSION
REPORT 98-934

CABLE FRANCHISE POLICY AND COMMUNICATIONS ACT OF 1984

REPORT

OF THE

COMMITTEE ON ENERGY AND COMMERCE

together with

ADDITIONAL AND SEPARATE VIEWS ON H.R. 4103

(Including cost estimate of the Congressional Budget Office)

* * * * * * *

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The Committee notes the Supreme Court's decision in the case of *Loretto* v. *Teleprompter,* 458 U. S. 419 (1982), striking down a New York state statute affording cable operators access to premises on the grounds that there was no provision in this statute for granting affected property owners just compensation for the use of their property. In

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order to comply with the constitutional requirements set forth by the court in that decision, this section requires that Commission regulations, and any regulations promulgated by a state of franchising authority, assure that the owner of any affected premises does receive just compensation.

Subsection (b) requires that prescribed regulations provide: (A) that the safety, functioning, and appearances of

the premises and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system; (B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; (C) that the owner be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator; and (D) methods for determining the calculation of just compensation.

In developing a methodology for determining what constitutes just compensation, among the factors that are to be considered, are the following, as set forth in subsection (d): the extent to which the cable system facilities physically occupy the premises; the actual long-term damage which the cable system facilities may cause to the premises; the extent to which the cable system facilities would interfere with the normal use and enjoyment of the premises; and, the enhancement in value of the premises resulting from the availability of cable service.

* * * * *

No. 87-7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

FREDRIC E. and ADRIAN MICHELS;
ROBERT and TERESA KLEIN;
RICHARD and PAMELA RECEVEUR; and
McKINLEY and WILMA THURMAN - Petitioners

versus

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.;
STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.;
LOUISVILLE GAS & ELECTRIC COMPANY; and
SOUTH CENTRAL BELL TELEPHONE COMPANY - - - - - - - Respondents

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STORER'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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STATEMENT OF AFFILIATION

Storer communications of Jefferson County, Inc. is indirectly owned in part by SCI Holdings, Inc. a Delaware corporation.

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TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-7

FREDRIC C. MICHELS, Et Al. - - *Petitioners*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC., Et Al. - - *Respondents*

STORER'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Comes the Respondent, Storer Communications of Jefferson County, Inc. (hereinafter "Storer"), and requests that this Court deny the Petition for Writ of Certiorari based on the facts, law and reasoning set forth herein.

COUNTERSTATEMENT OF THE CASE

Petitioners are four couples who have been and currently are cable television subscribers. The action originally brought by the Petitioners in the state trial court averred a common law action for trespass by Storer in serving those subscribers. The complaint filed by the Petitioners did not describe any cause of action other than trespass. It did not refer to any state statutes, federal statutes, state regulations, federal regulations, state constitutional provisions or federal constitutional provisions.

The complaint named Storer, Times Mirror Cable Television of Louisville, Inc. (hereinafter "Times Mirror"), Louisville Gas and Electric Company (hereinafter "LG&E"), and South Central Bell Telephone Company (hereinafter "South Central"). None of these four corporations are governmentally owned. The complaint includes no claims against the United States of America, the Commonwealth of Kentucky, their agencies or officials, nor any branch of local government. No allegations of operation under color of state or federal law were made in the complaint. No claims of condemnation or eminent domain were made. No allegations were made against the franchising authority.

The Petitioners revised their complaint on three occasions, but the characteristics described above never changed.

Storer and the other Respondents argued to the state trial court that actions of the Petitioners amounted to implied or express consent to the presence of cable television equipment, wires, and appurtenances in the utility easements which burdened their properties, in the drop-lines to their homes, and the equipment inside their homes. Respondents argued that consent of the Petitioners vitiated any claim of trespass they might have.

The state trial court granted summary judgment to Storer and the other Respondents. It found that Petitioners had consented to cable television's presence and so could not claim trespass. The state trial court issued findings related solely to trespass and consent.

The intermediate appellate court, the Court of Appeals of Kentucky, declined to review the soundness of the trial court's rationale, choosing instead to find that the utility easements in question were susceptible of apportionment to cable television usage. Additionally, based on prior Kentucky caselaw, the Court of Appeals found cable television to be a utility consistent with the utility easements in question in this case. See *City of Owensboro* v. *Top Vision Cable Co. of Kentucky,* Ky., 487 S. W. 2d 283 (1972). These two findings were the basis for affirmation of the result of the state trial court's judgment.

The Supreme Court of Kentucky then granted Discretionary Review of the Court of Appeal's decision and returned to the findings and rationale of the state trial court in rendering its affirming decision. The Supreme Court of Kentucky found the record clear that Petitioners had no objection to the installation of the cable television equipment when it was installed, that Petitioners signed an agreement permitting the cable television companies access to their properties for installation and maintenance of the cable television equipment, and that Petitioners agreed to the installation of an aerial drop line across their properties outside the confines of the easement to connect the cable within the easement to their residences (See Appendix to Petition for Writ, page 3a). The Supreme Court of Kentucky affirmed the decision in favor of Storer and the other Respondents based on the negation of any claim of trespass by the existence of Petitioners' consent to the presence of Storer and Times Mirror.

ARGUMENTS IN OPPOSITION TO PETITION

I. The Petitioners Fail to Establish Certiorari Jurisdiction.

There is no federal case or controversy. The Petitioners seek review by this Court of a judgment entered by a state court. The appellate jurisdiction of the United States Supreme Court is not completely unfettered. The Court's certiorari jurisdiction over state court judgments is determined by 28 U.S.C. §1257. For the Petitioners to even receive consideration of their petition they must first establish the Court's certiorari jurisdiction.

Under 28 U.S.C. §1257 the Petitioners must establish all of the following factors in their favor:

(i) the state court decision is final;
(ii) the decision is rendered by the state's highest court;
(iii) a federal question was duly raised and adjudicated in the state court;
(iv) the federal question is substantial; and
(v) the state court judgment does not rest on adequate non-federal grounds.

Consistent with 28 U.S.C. §1257 the Petitioners are required by Supreme Court Rule 21.1(h) to specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; and include pertinent citation to the record where the matters appeared.

Firstly, Petitioners state the certiorari jurisdiction of this Court is based on 28 U.S.C. 2101(c) and Rule 20.2. See Petition for Writ, pages 1-2. Each of those citations deals with the timeliness of a petition, not with the jurisdiction of this Court. Secondly, the Petitioners have neglected to comply with S.C. Rule 21.1 (h). There are no references in Petitioners' Statement of the Case to when, where or how any federal question(s) was (were) raised, passed upon, or preserved. Petitioners therefore fail to comply with 28 U.S.C. §1257. Under Supreme Court Rule 21.5 failure of Petitioners to present with accuracy and clarity whatever is essential to an understanding of the points requiring consideration is sufficient reason for denial of the Petition.

Storer submits to this Court that there was no substantial (or even insubstantial) federal question raised before the Supreme Court of Kentucky which was considered as a part of its decision. The failure of the Petitioners to comply with 28 U.S.C. §1257 and Supreme Court Rule 21.1(h) is directly attributable to the lack of a federal question. Under 28 U.S.C. §1257 this Court lacks certiorari jurisdiction to even consider whether or not to grant certiorari.

Petitioners refer in their Petition to a "taking" under the Fifth Amendment, to the inability of implied consent to cause waiver of a "constitutional right," and to the principle that a law cannot "unconstitutionally" impair a contract right; but these are recently contrived purported "federal questions" and were not raised in the complaint nor were they part of

the decision by the Supreme Court of Kentucky. This Court may not review federal constitutional issues raised before it for the first time on review of state court decisions. The federal question must have been raised and decided in the state court. If both of those factors do not appear on the record, appellate jurisdiction fails. *Cardinale* v. *Louisiana,* 394 U. S. 437, 438; 22 L. Ed. 2d 398; 89 S. Ct. 1161 (1968). This Court has also held that it is essential to the jurisdiction of this Court in reviewing a state court decision that it must affirmatively appear from the record that a federal question was presented to the highest state court and that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *Southwestern Bell Telephone Co.* v. *Oklahoma,* 303 U. S. 206, 212-213; 82 L. Ed. 751; 58 S. Ct. 528 (1937).

The complaint poses only a simple cause of action based on trespass. The trial court properly granted summary judgment. *Anderson* v. *Liberty Lobby, Inc.,* 477 U. S. ___, 91 L. Ed. 2d 202, 106 S. Ct. ___ (1986). The Supreme Court of Kentucky agrees with the finding of consent. No federal question was involved or included in that decision.

Article I, Section 10(1) of the United States Constitution is discussed at length by Petitioners, but it was not presented to nor considered by the trial court or the Supreme Court of Kentucky as a federal issue or question bearing on this case. Neither the Commonwealth of Kentucky nor any subdivision of state government nor any branch of local government is named

as a party. Article I, Section 10(1) applies only as a limitation of the legislative power of the states. *Peick* v. *Pension Benefit Guaranty Corp.*, 724 F. 2d 1247, 1263 (7th Cir., 1983) *certiorari denied* 104 S. Ct. 3554. Petitioners never presented to the state trial court or the Supreme Court of Kentucky any allegations of state legislative action which impaired their property rights.

The Supreme Court of Kentucky agreed with the state trial court that certain actions of Petitioners equalled consent. As a result it upheld dismissal of the Petitioners' complaint. Petitioners characterize this in their petition as an impairment of contract. At page 6 of the Petition for Writ, Petitioners equate the decision of the Supreme Court of Kentucky with a legislative act impairing a contract. Such an argument is incorrect under the proper intent of Article I, Section 10(1). *Cross Lake Club* v. *Louisiana*, 224 U. S. 632, 638; 56 L. Ed. 924; 32 S. Ct. 577 (1911), points out that a legislative act is required for application of Article I, Section 10(1), not a court decision determining property rights between two private individuals.

The Fifth Amendment and the Petitioners' assertion of a "taking" also have no bearing on this case. In the text of their Petition the Petitioners do not utilize the term "taking" in the sense intended by the Fifth Amendment. The Petitioners' action has never involved claims of eminent domain, condemnation, or inverse condemnation. Neither the Fifth Amendment nor the 14th Amendment is mentioned in Petitioners' complaint. The Supreme Court of Kentucky did not consider nor did it mention either Amendment in its

decision. No governmental entity is named by the Petitioners as a party to the complaint or as a participant in the facts allegedly underlying the cause of action set forth in the complaint.

Storer submits that the record is clear that the Supreme Court of Kentucky did not adjudicate, comment upon, nor involve itself with any federal question. The record is also clear that Petitioners did not raise below any allegations of a legislative act impairing a contract nor of a taking under the Fifth Amendment. They brought only a simple trespass action against four private corporations. Under 28 U.S.C. § 1257 this Court has no certiorari jurisdiction to consider any such arguments at this late date.

Storer submits further that Petitioners fail to show that the decision of the Supreme Court of Kentucky does not rest on adequate non-federal grounds. "This court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb* v. *Pitcairn,* 324 U. S. 117, 125; 89 L. Ed. 789; 65 S. Ct. 459 (1944). It must affirmatively appear that a federal question was decided and that its decision was essential to disposition of the case; and where it is not clear whether the judgment rests on a federal ground or an adequate state one, this Court will not review. *Herb* v. *Pitcairn, supra* at 126.

The decision of the Supreme Court of Kentucky is contained in the Appendix to the Petition for Writ at page 1a. It rests on purely state grounds without

any mention of a federal ground nor a federal question or issue; nor was it remotely necessary for the court to consider any federal issues, questions or grounds. The Supreme Court of Kentucky considered facts describing certain actions of the Petitioners, found consent on the part of the Petitioners, and agreed that trespass could not exist.

The Petitioners' failure to comply with and satisfy the requirements of 28 U.S.C. § 1257 and Supreme Court Rule 21.1(h) leave this Court with no jurisdiction to consider the Petition for Writ of Certiorari. The Petition for Writ of Certiorari must be denied.

II. The Petition Lacks Proper Character Under Rule 17.

Storer asserts that Petitioners have not and cannot affirmatively establish this Court's certiorari jurisdiction. Nevertheless, but notwithstanding Storer's arguments set forth hereinabove at Argument I, Storer submits the following comments regarding Supreme Court Rule 17 and Petitioners' request for review on writ of certiorari.

Supreme Court Rule 17 is the procedural rule promulgated by this Court to determine when it will grant review under certiorari jurisdiction. The Rule immediately points out that certiorari will only be granted "when there are special and important reasons therefor". It then sets out in three subparagraphs illustrations of the character of reasons that will be considered. The Petitioners fail to place themselves within any of the illustrations provided by Rule

17 and do not present a "special and important reason" for grant of the writ of certiorari.

Looking first to the three illustrative subparagraphs it is clear that subparagraph (a) cannot be applicable. This action arises out of a state court decision, not one by a federal court of appeal.

Subparagraph (b) does deal with a state court decision, so it may be applicable. It suggests that where a state court decides a federal question in a way which conflicts with (i) a decision of another state court of last resort or (ii) with a federal court of appeals, a writ of certiorari may be appropriate.

Applying this illustration to the Petition is not favorable to the Petitioners. The Petitioners offer three reasons for granting the writ: (1) they did not consent to trespass, (2) the easements on their properties were not apportionable, and (3) cable television is not a public utility.

First of all, the decision of the Supreme Court of Kentucky does not address apportionability of the Petitioners' easements nor does it address cable television's status as a public utility. It cannot therefore conflict with any other state or federal decisions on these points. Nowhere in Reasons II and III do Petitioners argue that a conflict exists or present any discussion of a clear conflict; they simply argue the merits. Apportionability and public utility status were part of the Kentucky Court of Appeals decision; but that was superceded by the Supreme Court of Ken-

tucky. Reasons II and III do not satisfy or meet the illustration provided in subparagraph (b) of Rule 17.1.

Secondly, Reason I of the Petition contains a lengthy argument that one cannot impliedly or unintentionally waive his constitutional rights. The "constitutional right" asserted is apparently Petitioner's right to protect their property under the Fifth Amendment. However, as was pointed out in Argument I hereinabove, this case does not involve any Fifth Amendment claim and never has. Petitioners' complaint has no such claim, the Supreme Court of Kentucky made no mention of a Fifth Amendment issue, and it could not have considered such an issue without any allegations to that effect by Petitioners and without a governmental entity as a party. The Fifth Amendment, standing alone without mention of the 14th Amendment, applies to the United States; but the United States is not a party to this action. The Cable Communications Policy Act, 47 U.S.C. § 541, et seq., is mentioned in Petitioners' Petition, but the Act was never addressed by the state trial court or the Supreme Court of Kentucky. Raising the Cable Communications Policy Act is a red herring since neither its application nor interpretation was ever discussed. It appears in the Petition solely as a desperate grab at legitimacy by the Petitioners.

Reason I is simply an argument on an issue not addressed by the Supreme Court of Kentucky. The Fifth Amendment was not addressed, so the decision of the Supreme Court of Kentucky cannot conflict with

any other decision that does address an issue related to the Fifth Amendment. Reason I fails to satisfy or meet the "conflict" illustration provided in subparagraph (b) of Rule 17.1.

Thirdly, Reasons I, II and III do not clearly show that the Supreme Court of Kentucky decided a federal question. The decision never addresses the Fifth Amendment, apportionability, or public utility status. Reasons I, II, and III do not contain any citations by Petitioners to where the Supreme Court of Kentucky made any such decision. Storer has already discussed at Argument I the Petitioners' failure to cite where the federal questions were presented and how they were passed upon. Petitioners simply assume that a constitutional right was properly presented by them and adjudicated in a contradictory manner, and go on to argue the merits as opposed to establishing the nuts and bolts underpinning their right to certiorari.

Storer notes that Petitioners do ask this Court at page 11 of the Petition to apply *Satin* v. *Hialeah Race Course, Inc., Fla.,* 65 So. 2d 475 (1953) instead of the case relied upon by the Supreme Court of Kentucky—*Bradford* v. *Clifton, Ky.,* 379 S. W. 2d 249 (1964). Petitioners do not characterize *Satin* as conflicting with *Bradford,* but instead ask this court to rewrite the decision, inserting *Satin* instead of *Bradford,* and so reverse the decision. That is an argument on the merits. If literary license is stretched just short of the breaking point, and the citation to *Satin* is considered to be the assertion of a conflict, that argument fails to sup-

port granting a writ because no federal question is involved in this case or in *Satin*[1].

Subparagraph (c) of the Supreme Court Rule 21.1 also deals with state court decisions. It states that where a state court has decided an important question of federal law which has not been, but should be decided by this Court, or has decided a federal question in conflict with a decision of this Court that a writ of certiorari may be appropriate.

Storer chooses not to belabor this Court by constantly repeating arguments. Subparagraph (c) does not apply because (i) no decision on or involving a federal law or question is made herein; (ii) no conflict is asserted by Petitioners; and (iii) no conflict could exist with Reasons II and III as presented by Petitioners since the Supreme Court of Kentucky did not rule on apportionability or public utility status.

This case is a simple trespass action under the common law of Kentucky. That is the way it was brought by the Petitioners in their complaint; that is the way is was handled by the state trial court; and that is the way is was disposed of by the Supreme Court of Kentucky. The case was decided on basic state law grounds related to trespass and consent. No federal issues or questions were part of the decision by the Supreme Court of Kentucky. "Special and important reasons" is a clause implying "a reach to a problem beyond the

[1]State law, not federal law, controls property rights, and to suggest that Kentucky must follow Florida property decisions is absurd. *Board of Regents of State Colleges* v. *Roth,* 408 U. S. 564 (1972).

academic or the episodic." *Rice* v. *Sioux City Cemetary,* 349 U. S. 70, 74; 99 L. Ed. 897; 75 S. Ct. 614 (1954). The Court does not sit to resolve non-federal issues nor does it sit to resolve questions on the sufficiency of evidence. Those, however, are the real reasons why the Petitioners seek a writ. This Court has no choice but to strike down the Petition.

CONCLUSION

This Court lacks certiorari jurisdiction under 28 U.S.C. § 1257, and the Petitioners fail to establish or set forth any reasons to believe so pursuant to Rule 21.1(h). Presented with a state court decision grounded on adequate state law principles; and provided with an argument on the merits instead of a description of any federal questions involved, conflicting opinions of other state or federal courts, or a new federal law decision; this Court has no option but to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified pursuant to U. S. Supreme Court Rule 28 that three copies hereof were mailed, first class U. S. Mail, postage prepaid, this 22nd day of July, 1987, to each of the following counsel of record: Nicholas W. Carlin, 911 Kentucky Home Life Building, Louisville, KY 40202, Counsel for Petitioners; Marvin Hirn, 2450 Meidinger Tower, Louisville, KY 40202, Counsel for Respondent Times Mirror; John Bilby, 2500 Brown & Williamson Tower, Louisville, KY 40202, Counsel for Respondent LG&E; and James Harralson, South Central Bell, P. O. Box 32410, Louisville, KY 40202, Counsel for Respondent South Central Bell.

LAURENCE J. ZIELKE
Counsel for Storer Communications of Jefferson County, Inc.

No. 87-7

IN THE

Supreme Court Of The United States

October Term, 1987

FREDRIC E. and ADRIAN MICHELS; ROBERT and TERESA KLEIN; RICHARD and PAMELA RECEVEUR and McKINLEY and WILMA THURMAN,
Petitioners

versus

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.; STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.; LOUISVILLE GAS & ELECTRIC COMPANY and SOUTH CENTRAL BELL TELEPHONE COMPANY,
Respondents

RESPONSE OF SOUTH CENTRAL BELL TELEPHONE COMPANY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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No. 87-7

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versus

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Respondents

RESPONSE OF SOUTH CENTRAL BELL TELEPHONE COMPANY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

JURISDICTION

South Central Bell does not agree that this Court's jurisdiction can be invoked pursuant to 28 U.S.C.A. § 2101 (c) (West 1982) and Rule 20.2, as Petitioners allege. The statute and rule only provide jurisdictional time requirements for filing petitions, not jurisdiction to review the matters raised. As argued below, South Central Bell does not believe this case presents questions within the Court's jurisdiction.

COUNTERSTATEMENT OF THE CASE

Petitioners are four couples who are subscribers to cable television services. Despite their voluntary acceptance of these services, and their signed agreements to allow the Community Antenna Television (CATV) companies to enter their property, petitioners filed this action contending that Times Mirror and Storer (the CATV companies serving the Louisville and Jefferson County, Kentucky area) have trespassed on their residential lots by placing certain cable television facilities in the easements which serve their properties. While objecting to some of the facilities, Petitioners do not object to the service wire, or drop line, which brings the cable television signal into their homes.

In addition, Petitioners sued Louisville Gas and Electric ("LG&E") and South Central Bell Telephone Company ("South Central Bell") for trespass. Petitioners do not contend that LG&E or South Central Bell[1] lack the right to place their respective electric and telephone facilities within the easement boundaries. Rather, Petitioners contended that LG&E and South Central Bell trespassed on their realty by granting the CATV Respondents the right to attach to their facilities.

South Central Bell has allowed and does allow CATV companies (including Times Mirror and Storer) to attach their CATV facilities to South Central Bell's facilities on the condition, among others, that all other necessary public and private authority has been obtained. As the language of the documents which grant this permission conclusively shows,[2] South Central Bell makes no attempt to convey any interest in Petitioners' realty. The only interest conveyed by South Central Bell is the license to the CATV companies to attach to South Central Bell facilities. Thus, attachment is authorized only where entry and presence is authorized.

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[1]The statement required by Rule 28.1 is contained in the Appendix, p. A-1.

[2]The pertinent language of the tariff and agreement is set forth in the Appendix, p. A-5.

On these facts, the trial court found that Petitioners had consented to the presence of CATV facilities. The Court of Appeals of Kentucky affirmed on different grounds, finding that the subdivision-type easements which serve Petitioners' lots were apportionable to cable television use. The Supreme Court of Kentucky also affirmed, finding, like the trial court, that Petitioners had consented to the presence of CATV facilities.

ARGUMENT

I. The questions presented by Petitioners are not federal questions. Even if construed as federal questions, they are answered on independent and adequate state grounds.

Petitioners pose three questions:

1. Did Petitioners consent to the placement of CATV distribution cable on their land when they timely objected to trespass within the statute of limitations?
2. Are electric and telephone easements unilaterally apportionable to new uses or new users such as CATV?
3. Is CATV a utility?

These questions are not federal questions. To demonstrate the obvious, this Court's jurisdiction over state court judgments is governed by 28 U.S.C.A. § 1257 (West 1966 & Supp. 1987), which grants the Court certiorari jurisdiction "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." Even a strained interpretation of this language will not bring the questions presented by Petitioners within its terms.

Petitioners' first question is difficult to interpret. Shed of its relational verbiage, it says: "Did Petitioners consent when they objected?" Fairly interpreted, it appears to present the question of whether Petitioners authorized entry to their property. Both the trial court and the Supreme Court of Kentucky an-

swered the question. Petitioners did authorize the presence of CATV facilities. In so holding, the courts relied upon Kentucky law. As the Supreme Court of Kentucky's Opinion shows,[3] it followed the Kentucky Rule enunciated in *Bradford v. Clifton,* Ky., 379 S.W.2d 249 (1964).

The second and third questions presented by Petitioners are also state questions. While the Supreme Court of Kentucky decided not to consider the questions, the Court of Appeals, relying upon established Kentucky law, found that the easements to which Petitioners' lots are subject were compatible with use by cable television. Kentucky law has long held that easements are susceptible to uses of contemporary technology, *see Cumberland Telephone & Telegraph Company v. Avritt,* 120 Ky. 34, 85 S.W. 204 (1905), and that cable television has the "attributes" of a public utility. *City of Owensboro v. Top Vision Cable Company,* 487 S.W.2d 283, 287 (Ky. 1972).

The questions arise from the tort case of trespass to land alleged and argued by Petitioners to three Kentucky courts, all of which ruled against Petitioners on grounds provided by state law. Questions under the Constitution, treaties, statutes or authority of the United States were not presented. Because the state courts have simply applied state law to state questions, the Petition does not raise a federal question within the jurisdiction of the Court. *Agins v. City of Tiburon,* 447 U.S. 255, 65 L. Ed. 2d 106, 111 n.6, 100 S. Ct. 2138 (1980).

II. Mentioning the Fifth Amendment in the Petition for Rehearing to the Supreme Court of Kentucky does not properly or timely raise it before this Court.

The Court's Rule 21.1(h) requires that Petitioners show that federal questions were specifically, properly and timely raised. As demonstrated by the Petition itself, Petitioners did not mention the Fifth Amendment until their Petition for Rehearing before the Supreme Court of Kentucky.[4] This Court

[3]Petitioners' Appendix, p. 3a.

[4]Petition, p. 4.

does not consider issues raised for the first time in a state Supreme Court brief, *Exxon Corp. v. Eagerton,* 462 U.S. 176, 76 L. Ed. 2d 497, 504 n.3, 103 S. Ct. 2296 (1983), nor does Kentucky procedure permit such consideration. *Kentucky Milk Marketing and Antimonopoly Commission v. Kroger Company,* 691 S.W.2d 893, 901 (Ky. 1985).

Nor did Petitioners raise a taking issue during the course of the case. Their descriptions of the case in the Introductions[5] to each of their principal appellate briefs show that their allegation was one of trespass:

> Court of Appeals
>
> INTRODUCTION
>
> The Appellants sought trespass damages for location of CATV cable and appurtenances in the public utility easements on their property and sought a class action. On cross-motions for summary judgment the Appellees were granted summary judgment, and Appellants appeal this Order and the denial of Appellants' Motions for Summary Judgment.
>
> Supreme Court
>
> INTRODUCTION
>
> The Movants seek trespass damages for location of CATV cable and appurtenances in the public utility easements on their property, and appeal from Judgment of the Court below which found public utility easements to be apportionable and found CATV operators to be public utilities. The decision of the Court below affirmed Summary Judgment of the lower court, but affirmed on different grounds.

Kentucky procedural rules also require a Statement of Points and Authorities which are to set forth succinctly the contentions of a party respecting issues of law. Ky. C.R. 76.12 (c)

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[5]Kentucky procedural rules require appellant/petitioner briefs to begin with an Introduction describing the nature of the case. Ky. C.R. 76.12 (c) (4) (i).

(4) (iii). As their Statements[6] in the same briefs reveal, Petitioners were not alleging a taking.

Even without the procedural failures noted above, Petitioners apparent new claim that the private persons they have sued deprived them of constitutional privileges is unfounded. The authority[7] now cited by Petitioners properly stands for the general proposition that governments owe citizens obligations and privileges guaranteed by the United States Constitution, but the authority is not applicable to this dispute between citizens.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Counsel of Record for Respondent South Central Bell Telephone Company

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[6]The Statements of Points are set forth in the Appendix, p. A-7.

[7]All of the authority predates the filing of the Petitioners' first Complaint.

CERTIFICATE OF SERVICE

I certify pursuant to Supreme Court Rule 28 that three copies hereof were mailed, first class postage prepaid, this 27 day of July, 1987, to Mr. David Armstrong, Office of Attorney General, Capitol Building, Frankfort, Kentucky 40601, and to the following counsel of record: Mr. Marvin J. Hirn, 3300 First National Tower, Louisville, Kentucky 40202, Counsel for Times Mirror; Mr. John Bilby, 2500 Brown & Williamson Tower, Louisville, Kentucky 40202, Counsel for LG&E; Mr. Laurence J. Zielke, 450 S. Third Street, Louisville, Kentucky 40202, Counsel for Storer; Mr. Nicholas W. Carlin, 911 Kentucky Home Life Building, Louisville, Kentucky 40202, Counsel for Petitioners.

James G. Harralson
Counsel of Record for
Respondent South Central
Bell Telephone Company

APPENDIX

APPENDIX

South Central Bell Telephone Company is a wholly-owned subsidiary of BellSouth Corporation. Listed below are the companies, and their subsidiaries, affiliated with BellSouth Corporation.

Parent Corporation	*Subsidiary*
BellSouth Corporation	Southern Bell Telephone and Telegraph Company
	South Central Bell Telephone Company
	BellSouth Financial Services Corporation
	BellSouth D.C., Inc.
	BellSouth Enterprises, Inc.
	BellSouth National Publishing Incorporated
Augusta Cellular Corporation	American Cellular Communications Corporation
BellSouth Advanced Systems, Inc.	BellSouth Personal Mobile Communications Corporation
	Commtel, Inc.
BellSouth Communications Holdings, Inc.	BellSouth Communications, Inc.
BellSouth Enterprises, Inc.	BellSouth Mobility, Inc.
	BellSouth Advertising and Publishing Corporation
	Sunlink Corporation
	BellSouth Systems Technology, Inc.
	TechSouth, Inc.
	BellSouth Advanced Systems, Inc.

	FiberLAN, Inc.
	BellSouth International, Inc.
	Graphics Holding Company
	BellSouth Government Systems, Inc.
	BellSouth Ventures Corporation
	BellSouth Information Systems, Inc. (BIS)
	L. M. Berry and Company
	South Star Ventures, Inc.
	American Cellular Communications Corporation
	Dataserv, Inc.
	BellSouth Communications Holdings, Inc.
	Tri Data Systems, Inc.
BellSouth International Communications (U. K.) Limited	Air Call Communications (Holdings) Limited
BellSouth International, Inc.	BellSouth International (Asia/Pacific), Inc.
BellSouth Mobility, Inc.	Atlanta CGSA, Inc.
	Florida Cellular Service, Inc.
	New Orleans, CGSA, Inc.
	Baton Rouge CGSA, Inc.
	Alabama Cellular Service, Inc.
	Chattanooga CGSA, Inc.
	Jacksonville CGSA, Inc. (merged into Florida Cellular Service, Inc.)
	Kentucky CGSA, Inc.
	Memphis CGSA, Inc.
	Nashville CGSA, Inc.
	Orlando CGSA, Inc.

	South Carolina Cellular Service, Inc.
	Space Coast Cellular, Inc.
BellSouth Services Inc.	Bell Communications Research, Inc.
BellSouth Ventures Corporation	BellSouth Advanced Networks, Inc.
Compel Group Public Limited Company	Compel Public Limited Company
	Faxlease Limited
	Fenchurch Industrial Supply Company Limited
	Softlease Limited
Dataserv, Inc.	Dataserv BV
	Dataserv Computer Maintenance, Inc.
	Dataserv, Computer Wartungs-und Vertreibs-Gesellchaft m.b.H.
	Dataserv Equipment, Inc.
	Dataserv Finance and Leasing Limited
	Dataserv Financial Services, Inc.
	Dataserv GmbH
	Dataserv Incorporated Scandinavia AB
	Dataserv Incorporated Scandinavia ApS
	Dataserv Limited
	Dataserv Premier Limited
	Dataserv S.A.R.L.
	Dataserv S.p.a.
Dataserv Equipment, Inc.	PDS Financial, Inc.

Dataserv (Holdings) Limited	Premier Computers (Benelux) SA Premier Computers GmbH
Dataserv Limited	Compel Group Public Limited Company Dataserv (Finance) Limited Dataserv (Holdings) Limited Dataserv (Leasing) Limited Premier Computers Limited
Graphics Holding Company	Graphics Merger Company
Graphics Merger Company	Stevens Graphics, Inc.
L. M. Berry and Company	L. M. Berry and Company-NYPS L. M. Berry Services, Inc. ITT World Directories, Inc.
Premier Computers Limited	Dataserv (P.O.S.) Limited
South Central Bell Tel. Co.	BellSouth Services Inc. South Central Bell Advanced Systems, Inc.
Southern Bell Telephone and Telegraph Company	BellSouth Services Inc. Southern Bell Advanced Systems, Inc.

LANGUAGE FROM TARIFF AND AGREEMENTS

TARIFF 1F (Exhibit 3, South Central Bell Motion for Summary Judgment, T.R. Item 182)

Subject to the provisions of this tariff, the Company will authorize the attachment of an attachee's facilities to a pole or anchor or the placement of an attachee's facilities in a conduit system for the purpose of providing the services of a cable television system.

The other provisions include the following section:

Attachee shall be responsible for obtaining from the appropriate public and/or private authority any required authorization to construct, operate and maintain its facilities on such public or private property before it attaches its facilities to poles and anchors, or occupies conduit located on the same public and/or private property.

AGREEMENTS (Exhibit 5, South Central Bell Motion for Summary Judgment, T.R. Item 182)

Whereas, Licensor [South Central Bell] is willing to permit, *to the extent it may lawfully do so,* the placement of said cables, equipment and facilities in Licensor's poles where reasonably available . . . [preamble to agreement]

Subject to the provisions of this Agreement, the Licensor [South Central Bell] will issue to Licensee [CATV companies], for any lawful communications purpose, revocable, nonexclusive licenses authorizing the attachment of Licensee's cables, equipment and facilities to Licensor's poles and anchors . . . . [Article II of Agreements]

Licensee [the CATV company] shall submit to Licensor [South Central Bell] satisfactory evidence of Licensee's lawful authority to place, maintain and operate its facilities within public streets, highways, and other thoroughfares and *shall secure any necessary permits and consents* from Federal, State, County and Municipal authorities and *from the owners of*

property to construct, maintain and operate facilities at the locations of poles and anchors of Licensor which it uses . . . . [Article V of Agreements] (Emphasis Added.)

PETITIONERS' STATEMENTS OF POINTS IN BRIEFS BEFORE KENTUCKY APPELLATE COURTS

Court of Appeals

I. Whether the court erred in granting summary judgment to the appellees on the basis of consent, waiver or estoppel.
II. Whether the language on appellants' plats permits apportionment.
III. The court abused its discretion by granting summary judgment to appellees prior to the scheduled filing of appellants' reply briefs.
IV. Issues not addressed in the court's orders of summary judgment.
V. The trial court should have granted summary judgment against each appellee.

Supreme Court

I. Did the court below err in finding Movants' easements apportionable to CATV usage?
II. Did the court below err in finding that the use of easements by CATV companies places no additional burdens on movants?
III. Did the court below err in declaring CATV operators to be public utilities?
IV. Did the court below err in giving precedent value to the California case of *Salvaty v. Falcon Cablevision*?
V. Did the trial court err in granting summary judgment to respondents on the basis of consent, waiver or estoppel?
VI. Did the trial court abuse its discretion by granting summary judgment to respondents prior to scheduled filing of movants' reply briefs?
VII. This court should grant summary judgment to movants against each respondent.

No. 87-7

In The

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FREDRIC E. and ADRIAN MICHELS;
ROBERT and TERESA KLEIN;
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McKINLEY and WILMA THURMAN,

Petitioners

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.;
STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.;
LOUISVILLE GAS & ELECTRIC COMPANY; and
SOUTH CENTRAL BELL TELEPHONE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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TABLE OF CASES AND AUTHORITIES

COUNTERSTATEMENT OF CASE

This brief is submitted by Times Mirror Cable Television of Louisville, Inc. ("Times Mirror"),[1] by counsel.

This is a case of an alleged trespass in which the Jefferson Circuit Court of the Commonwealth of Kentucky granted summary judgment to Times Mirror on the grounds that the Petitioners asserting claims against Times Mirror, Fredric E. and Adrian Michels and Robert and Teresa Klein (individually, the "Michels" or "Kleins" and collectively the "Petitioners"), consented to the presence of Times Mirrors cable television coaxial cable on Petitioners' residential properties. The Court of Appeals of Kentucky affirmed upon the basis that the Petitioners' easements, through which the coaxial cable of Times Mirror was installed on utility poles, were, by their terms, apportionable or expressly authorized the presence of the cable. The Supreme Court of Kentucky affirmed the decision of the Court of Appeals upon the same grounds as those upon which the Jefferson Circuit Court granted summary judgment, that is, consent.

The deed to the Kleins' residential property in Louisville, Kentucky, provides that it is subject to all easements of record. These easements include "a five foot easement . . . retained across the rear [of the lot] for public utility purposes". (R. 2164-65.) The Kleins subscribed to the cable television services of Times Mirror almost immediately after they moved into their home in 1983. At that time, they signed an agreement with Times Mirror which provided that:

---

[1]In compliance with Rule 28.1 (Statement of Subsidiaries and Affiliates) Times Mirror states that its parent corporation is Times Mirror Cable Television, Inc. and that it has no affiliates or subsidiaries.

> Customer hereby grants to Company the right to enter upon and over the premises at reasonable times at the above address at any time during this agreement to install, connect, disconnect, inspect or alter the service facilities.

(R. 2168-69.)

The deed to the Michels' residential property in Louisville, Kentucky, also provides that it was subject to all easements of record. (R. 2153-54.) One of these easements provided as follows:

> The spaces outlined by dotted lines and marked 'Electric and Telephone Easement' or 'Street Lighting Easement' are hereby reserved as easements for electric and telephone utility purposes including the right of ingress and egress over all lots to and from the easements and the right to cut down or trim trees within or without the easements that may interfere with the installation or operation of the lines. The easements shall be kept free of all obstructions including permanent fences, trees, shrubbery and gardens.

The Michels also subscribed to the cable television services of Times Mirror and executed an agreement providing that:

> Applicant hereby agrees to abide by the regulations of the Company as listed below:
>
> 1. Permit authorized personnel of Company free access to the premises for the installation and service of the cable drop wire, converter, home terminal unit, and other equipment . . . .

———o———

SUMMARY OF ARGUMENT

This case presents no issue of federal law. It is a trespass action and the judgment of the Supreme Court of Kentucky is based upon an independent and adequate state law ground, that is, Petitioners consented to the presence of Time Mirror's coaxial cable. The judgment of the Supreme Court of Kentucky is also supportable on other state law grounds. These are that the Petitioners' easements were apportionable, or expressly authorized the presence of Times Mirror's coaxial cable.

———o———

ARGUMENT

I. THE WRIT SHOULD BE DENIED BECAUSE THE JUDGMENT OF THE SUPREME COURT OF KENTUCKY IS BASED UPON INDEPENDENT AND ADEQUATE STATE GROUNDS

That this Court lacks the power to review state court judgements except to the extent that they incorrectly adjudge federal rights has been characterized as "so obvious that it has rarely been thought to warrant statement." *Herb v. Pitcairn,* 324 U.S. 117, 125-26 (1945). Specifically, this proposition and its rationale have been stated as follows:

> [The rationale] is found in the partioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

As one commentator has noted "The independent and adequate state ground rule is thus a corollary of the fundamental principle that the [Supreme] Court lacks jurisdiction to review matters of state law." Stern & Gressman, *Supreme Court Practice* (6th ed), Section 3.25.

That the Petitioners seek to have this Court review matters of state law is illustrated by the three Questions Presented for review:

I. Did the Petitioners consent to the placement of CATV distribution cable on their land when they timely objected to trespass within the Statute of Limitations?

II. Are electric and telephone easements unilaterally apportionable to new uses or new users such as CATV?

III. Is CATV a utility?

The answers to these Questions by the Supreme Court of Kentucky and one of its Justices in a concurring opinion further illustrate that each presents issues exclusively within the domain of state law. In response to the first Question, the Supreme Court of Kentucky, citing to Kentucky cases or the Restatement of Torts, held that:

> We think it is clear that the [Petitioners] had no objection to the installation of the cable television equipment when it was installed upon the utility poles within the confines of the easement. They signed an agreement permitting the employees of the cable companies access to their property for the installation and maintenance of the cable equipment, and they further agreed that the cable companies might install an aerial drop line across their property outside the confines of the easement to connect the coaxial cable to their residences.

In response to the second Question Presented, the Supreme Court stated that "We decline to review the question of the apportionability of the easement involved in this case." However, one of the Justices of the Supreme Court of Kentucky did address this issue in his concurrence to the majority opinion and he stated as follows:

> In each of the cases presently involved, the existing public utility easement was sufficient to permit apportionment to accommodate new technology. The apportioned use of the easements by the CATV companies places upon the appellants as owners of the servient estates no additional burdens which should be considered beyond the contemplation of the easement in question.

The majority opinion of the Supreme Court of Kentucky also did not address the third Question Presented by the Petitioners to this Court. However, one of the Justices of that court did address this third Question in his concurrence. He stated that:

> However, I agree with the Court of Appeals that CATV is in fact a public utility within the contemplation of the easement in question, and that the CATV industry is not deprived of its status simply because utility regulatory agencies of the federal and state governments have declined to regulate it.

Obviously, the Questions Presented by the Petitioners are questions of state law. The first Question concerns a simple issue of whether there was a consent to an alleged trespass. The second concerns whether Petitioners' easements were apportionable to Times Mirror and the third concerns whether Times Mirror is a utility within the meaning of one of the Petitioners' easements. None of these is an issue of federal law, arises under any provision of the Constitution of the United States or presents any issue of the construction of a federal statute.

Apparently, Petitioners believe that their Petition presents a constitutional issue because they have allegedly been denied some constitutional right. However, constitutional rights may only be denied through state action. *See, Lloyd*

v. Tanner, 407 U.S. 551 (1972). As a private corporation, Times Mirror cannot deny Petitioners any constitutional right.

Finally, Petitioners contend that somehow the judgment of the Supreme Court of Kentucky is inconsistent with the decision of this Court in *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419 (1982). This contention is meritless. In that case, this Court invalidated a state statute requiring landlords not to interfere with, or charge a fee for installation of cable television facilities upon their rental property. The state law issues of construction of easements and whether there had been consent to an alleged trespass were not at issue in that case, as they are here.

———o———

CONCLUSION

For the reasons stated above, the Writ should be denied.

Respectfully submitted,

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(5)

No. 87-7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

FREDRIC E. and ADRIAN MICHELS;
ROBERT and TERESA KLEIN;
RICHARD and PAMELA RECEVEUR and
McKINLEY and WILMA THURMAN - Petitioners

versus

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.;
STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.;
LOUISVILLE GAS & ELECTRIC COMPANY and
SOUTH CENTRAL BELL TELEPHONE COMPANY - - - - - - - Respondents

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BRIEF OF LOUISVILLE GAS & ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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BRIEF OF LOUISVILLE GAS & ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Louisville Gas & Electric Company, by counsel, responds to the Petition for Writ of Certiorari to the Supreme Court of Kentucky and asks the Supreme Court of the United States to deny the Petition for the reasons now set forth.

COUNTERSTATEMENT OF THE CASE

In contrast to the statement of the case offered by the Petitioners, Louisville Gas and Electric Com-

pany ("LG&E") submits the facts of record are simple, clear and uncontradicted.

The Petitioners are four married couples. Each couple owns or owned a parcel of residential real estate. Each piece of real estate is subject to certain open and exclusive easements of record. Utility poles owned by LG&E or South Central Bell are located in these easements. Cables are attached to the utility poles which belong to LG&E and Bell and either one of the two community antenna television ("CATV") companies: Times Mirror Cable Television of Louisville ("Times Mirror") or Storer Cable Communications of Jefferson County ("Storer Communications"). (Collectively referred to as the "CATV Respondents.")

The Petitioners initiated a civil action against the Respondents, alleging that trespass was committed upon their property by the presence of the CATV distribution cables attached to the utility poles at the rear of their lots. The Petitioners do not object to the CATV cable running from those poles to their homes.

LG&E collects cable attachment charges from the CATV Respondents for use of the space on its poles, pursuant to LG&E's Cable Television Attachment Charges ("CATC") tariff. The CATC tariff is on file with and was approved by the Kentucky Public Service Commission. The charges for the attachment and the provisions for the right to make such an attachment are regulated by the Kentucky Public Service Commission. The attachments of cable to the poles are as a matter of law in Kentucky a "service" un-

der Chapter 278 of the Kentucky Revised Statutes. *See Kentucky CATV Association* v. *Volz,* 675 S. W. 2d 393, 396 (Ky. App. 1983).

The record below contains substantial evidence that the Petitioners, three of whom are lawyers, have expressly and impliedly given their consent to the presence of CATV cable on their property. The testimony and conduct of the Petitioners clearly establishes their respective grants of consent.

For example, the Michels, Kleins, Receveurs and Thurmans are subscribers of either Times Mirror or Storer Communications cable services. In exchange for monthly payments, they each receive CATV service.

In addition, the Michels, Kleins, Receveurs and Thurmans each signed written agreements to subscribe to the CATV service. The written agreements are evidence of the consent for the CATV Respondents to install the necessary cables to provide service to the Petitioners' homes.

Significantly, the Michels, Kleins, Receveurs and Thurmans do *not* object to the presence of CATV cable running between the poles and their homes, known as a "drop line."

Finally, the Michels, Kleins, Receveurs and Thurmans have not discontinued their CATV service since their complaint was filed with the Jefferson Circuit Court in Louisville, Kentucky.

After more than a year of discovery, all the parties to this action moved for summary judgment, including

the Petitioners. The Jefferson Circuit Court then made the following findings of fact with respect to each of the Petitioners:

(a) *Michels:*

The Michels claim the trespass occurred on their private-residential property located at 3117 Dell Brooke. The residence was purchased in 1976 and has since been sold. The Michels were subscribers to cable television, and permitted Times-Mirror employees to come on their property to install equipment for cable television services. *They signed an agreement with Times-Mirror as part of their application for service. That agreement authorized free access to the premises for installation and service of equipment.* The only cable equipment on their property was the dropline connecting the service to the residence and the aerial coaxial cable hung within a public utility easement. *The Michels have demonstrated no diminished use of their real property and no injury to tree limbs or shrubs done by Times-Mirror.* [Emphasis added].

(b) *Kleins.*

The Kleins claim the trespass occurs continually at their present residence on Woodfill Way. The Kleins were subscribers to cable television previously and continued subscription to cable television at Woodfill Way. *Like the Michels, the Kleins are cable subscribers who have signed an agreement with Times-Mirror permitting access for installation and maintenance of cable equipment.* They also have not contested the dropline that links their residence to the aerial coaxial cable that

is hung within a public utility easement on their property. They claim trespass on land by the aerial coaxial cable and seek compensatory damages, not injunctive relief. *In fact, the Kleins do not want the cable removed and plan to continue cable television services.* They have demonstrated no injury to their realty or its use by the presence of the cable. [Emphasis added].

(c) *Receveurs:*

The Receveurs claim the trespass occurs continually at their residence at 11 Narwood Drive. The Receveurs were subscribers to cable television, and permitted Storer employees to come on their property to install equipment for cable television services. *The Receveurs are presently cable subscribers who have signed an agreement with Storer permitting access to the premises for installation and service of equipment. The Receveurs do not want the cable removed and plan to continue to receive cable television services.* They do not contest the dropline that links their residence to the aerial coaxial cable that is hung within a public utility easement on their property. They claim trespass on land by the aerial coaxial cable and seek compensatory damages, not injunctive relief. The Receveurs have demonstrated no diminished use of their real property and no injury to their realty, tree limbs or shrubs done by Storer. [Emphasis added].

(d) *Thurmans:*

The Thurmans claim the tresspass occurs continuously at their present residence at 6207 Bay Pine Drive. *The Thurmans were subscribers to cable*

television and like the Receveurs, have signed an agreement with Storer permitting access for installation and maintenance of cable equipment. They have not contested the dropline that links the residence to the aerial coaxial cable nor do they have any objections to the aerial coaxial cable because they admit it is necessary for them to receive cable television services. They claim trespass on land by a down guy and anchor placed within a public utility easement on their property and seek compensatory damages, not injunctive relief. *The Thurmans do not wish to have cable television removed from their home and plan to continue to receive cable television services.* They have demonstrated no injury to their realty or its use by the presence of the Storer down guy and anchor.[1] [Emphasis added].

Having made the foregoing findings of fact, the trial court concluded:

> To prevail on the merits, the Plaintiffs must demonstrate a trespass to their private real property and injury to the property's use or value.
>
> The Michels no longer live at 3117 Dell Brooke. There was no demonstrated injury to their property by the presence of the cable. There is no continuing trespass as the couple no longer resides at the location. Their claim is rendered moot and therefore unable to be sustained in this action.
>
> The claims of continuing trespass by the Kleins, the Receveurs, and the Thurmans are likewise unable to stand on the merits. . . . Implied consent may be found as a matter of law where habitual

[1]See Appendix A to Brief.

> use of property for a particular purpose existed with the knowledge of the owner and without the owner's objection . . . There has clearly been a habitual and obvious use of the public utility easements over the property of the Kleins, the Receveurs and the Thurmans, by Times-Mirror cable or by Storer cable and equipment without objection by the Kleins or by the Receveurs or Thurmans other than the present action. In addition, the undisputed subscriber agreements signed by the Kleins, the Receveurs, and the Thurmans, and their desire to continue subscriber services logically give rise to the implication of consent to the coaxial cable and cable television equipment which enables the provision of subscriber services to the Kleins, the Receveurs, and the Thurmans. Where the Kleins, the Receveurs and the Thurmans, have, by implication, consented and continued to consent to the presence of the cable, their claim cannot be sustained in this action.
>
> As none of the plaintiffs, including the Michels, the Kleins, the Receveurs, and the Thurmans, have standing to continue their respective claims against Times-Mirror or against Storer for trespass, so must *their derivative claims against the co-Defendants, Louisville Gas & Electric Company and South Central Bell Telephone Company, fail on the merits.*[2] [Emphasis added].

The trial court then granted summary judgment and dismissed the claims of the Petitioners.

On appeal, the Court of Appeals for Kentucky declined to review the trial court's rationale for finding

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[2]See Appendix A to Brief.

consent on the part of the Petitioners, but affirmed its judgment. Instead, the Court of Appeals for Kentucky held that the easements crossing Petitioners' properties were susceptible to apportionment to CATV usage. *Michels* v. *Times Mirror Cable Television of Louisville, Inc.,* No. 85-CA-1081, Slip Opinion, pp. 3-4 (Ky. App., Jan. 31, 1986).[3]

Petitioners filed a Motion for Discretionary Review with the Kentucky Supreme Court which was granted. Like the Court of Appeals of Kentucky, the Supreme Court of Kentucky affirmed the judgment of the trial court, but for a different reason than that given by the Court of Appeals of Kentucky. The Kentucky Supreme Court held:

> We think it is clear that the movants had no objection to the installation of the cable television equipment when it was installed upon the utility poles within the confines of the easement. They signed an agreement permitting the employees of the cable companies access to their property for the installation and maintenance of the cable equipment, and they further agreed that the cable companies might install an aerial drop line across their property outside the confines of the easement to connect the coaxial cable to their residences.

Michels v. *Times Mirror Cable Television of Louisville, Inc.* No. 86-SC-123-DG, Memorandum Opinion (Ky., Jan. 22, 1987).[4] The Kentucky Supreme Court declined to review the issue of apportionment of the ease-

[3]See Appendix B to Brief.

[4]See Appendix C to Brief.

ments, but affirmed the judgment of the trial court. The Petitioners then filed a petition for rehearing and or modification and extension of opinion with the Kentucky Supreme Court. It was denied.

REASONS FOR DENYING THE WRIT

1. The Petition Fails To State A Substantial Federal Question.

The Petition fails to state a substantial federal question. The Court therefore lacks jurisdiction to grant the writ of certiorari. 28 U.S.C. § 1257.

The judgment of the trial court and the decision of the Kentucky Supreme Court to affirm the trial court's judgment do not raise substantial federal questions. The Petitioners filed a complaint alleging that a trespass occurred through the actions of the Respondents. The Respondents raised the defense of consent. The trial court found the Petitioners had consented to the presence of CATV cable and granted judgment in favor of the Respondents. The Kentucky Supreme Court affirmed the judgment of the trial court on the grounds of consent and the general principles of estoppel.

In previous decisions, this Court has declined to review similar decisions by state courts on the grounds that an estoppel under state law does not present a federal question. *Adams County* v. *Burlington and Missouri River Railroad Co.,* 112 U. S. 123 (1884). The decision by the Kentucky Supreme Court is local in nature, involving issues of trespass, consent and estoppel and does not present a substantial federal

question. This Court has long held that it will not review state court judgments where such judgments rest on adequate state grounds. *Hammerstein* v. *Superior Court of California,* 340 U. S. 622 (1951).

The Court should deny the Petition on the ground that it fails to raise a substantial federal question.

2. The Kentucky Courts Have Correctly Affirmed The Judgment Of The Trial Court; No "Taking" Under The Fifth Amendment Has Occurred.

The Petition has raised the argument of a lack of consent once again. This argument was extensively briefed before the Jefferson Circuit Court, the Kentucky Court of Appeals, the Supreme Court of Kentucky and now this Honorable Court. While Petitioners are perhaps disappointed at the resolution of the issue of consent by all three of the Kentucky courts which have found consent, those Kentucky courts clearly did not misconceive this issue. The Supreme Court of Kentucky has ruled and the trial court has found that the evidence is clear that the Petitioners consented to the entry by the CATV companies.

If the Petitioners held any right to object to the presence of CATV cable before they signed the written subscription agreements (and they did not), the Michels, the Kleins, the Receveurs and the Thurmans subsequently waived their objections and are now estopped to claim otherwise. Indeed, the arguments of counsel for the Petitioners contradicts the testimony and actions of the Michels, the Kleins, the Receveurs and the Thurmans.

Having signed the cable subscription agreements to receive CATV service, the Petitioners waived any objections to the presence of the coaxial cable. The Petitioners received and today continue to receive the benefits of cable television in exchange for monthly payments. Under these circumstances, the Kentucky courts have repeatedly upheld the invocation and application of the doctrine of estoppel where, as here, the party denying the estoppel seeks to maintain a position inconsistent with his acquiescence or acceptance of a benefit. *See, PV&K Coal Co.* v. *Kelly,* 191 S. W. 2d 231, 234 (Ky. 1945). The Petitioners accepted and continue to accept the benefits of cable television service, but also claim damages because of the presence of the CATV cable.

Moreover, the Petitioner's argument of lack of consent squarely contradicts the fundamental rule recognized by the Kentucky court in *Martin* v. *Gayheart,* 264 S. W. 2d 653, 654 (Ky. 1954):

> It is a rule of general application in all jurisdictions that one who stands by and sees another enter upon land under a claim of right and permits the entrant to make expenditures or improvements under circumstances which would call for notice or protest cannot afterward assert his own title against such person.

Applying this well founded principle, the Petitioners, assuming they had "rights" upon which to raise objections, should have objected. Instead, they chose to contract with the CATV Respondents and recieve the

provision of CATV service. They now cannot claim trespass.

The argument by Petitioners that they were somehow misled into consenting to the presence of CATV cable is without merit. The specious nature of this argument was addressed in *Blackburn* v. *Piney Oil & Gas Co.*, 128 S. W. 2d 192 (Ky. 1939). In *Blackburn, supra,* an oil company moved a drilling rig onto a portion of the plaintiff's garden. The plaintiff made no objection until 15 months after the well was completed. Suit was filed and the oil company raised the defense of estoppel. There, as here, the plaintiff argued on appeal that:

> he made no objection at the time to the drilling of the well because he was ignorant of his rights under the mineral deed, and that the [oil company] was acquainted with [his rights in the garden property].

Id. at p. 194.

The trial court, upon the taking of proof, found that the plaintiff "knew this well was located in the garden, or at least he had constructive knowledge thereof, and his action in permitting the defendant Oil Company to drill this well without objection and without asserting any claim to the minerals under his garden estopped him from now claiming the well." *Id.* On appeal, the Kentucky Court of Appeals, then the highest court of review, held:

> This deed was of record and being in plaintiff's chain of title, he is presumed to have knowledge of

> what it contained. It is argued by plaintiff that the oil Company likewise had constructive knowledge of the exception in the deed, therefore, it had notice it could not drill on this spot. But when plaintiff consented for the Oil Company to drill on this location it was justified in thinking plaintiff had waived the exception in the mineral deed. *Appellant cites us many cases to the effect that a person who is ignorant of a situation whereon he should have acted, is not estopped by his failure to act.* Typical of the cases he cites is Shaw v. Farmers' Bank & Trust Company, 235 Ky. 502, 31 S.W. 2d 893, wherein it was held a lienholder was not estopped to assert his lien because he did not announce same at an auction sale of the property, it not being proven he heard the auctioneer announce that the property would be sold free of encumbrance. Obviously, a man would not be called on to assert his lien when he did not hear the announcement that the property would be sold free of encumbrance. *The Shaw and similar cases have no bearing on the question that plaintiff after permitting a well to be drilled in his garden can deny he is estopped from claiming the well fifteen months later because he did not know he had a right to object to it being drilled.*

Id. at p. 195. (Emphasis added; citations omitted in part).

Likewise, the Petitioners cannot deny that they are estopped from claiming the CATV cable is a form of trespass years after the CATV cable was installed because they somehow did not know they had a right to object to it being installed.

Petitioners are no different than the dissatisfied plaintiff in *Blackburn, supra.* They gave their consent based on the facts which they knew then and are no different today.

Petitioners had full knowledge of the *fact* that CATV cable was being installed in the easements of record and are certainly aware today of the presence of the CATV dropline to which they have no objection. To argue as Petitioners do that they have been somehow duped, as lawyers, is inconsistent with their actions, unsupported by the evidence of record and simply untenable. The Kentucky Supreme Court correctly determined that Petitioners' actions preclude their action for trespass.

Furthermore, Petitioners' reliance on *Satin* v. *Hialeah Race Course,* 65 S. 2d 475 (Fla. 1953) is misplaced for two reasons. LG&E did not license the use of the easements to the CATV companies. The Kentucky courts have held that LG&E provides a "service" in the form of the provision of "cable attachments" to the CATV companies. *See Kentucky CATV Association* v. *Volz,* 675 S. W. 2d 393, 396 (Ky. App. 1983). *See also* KRS 278.030(2); KRS 278.170(1); and 807 KAR 5:006 §17 "Cable Television Pole Attachment . . . Regulation."

Secondly, the Petitioners at bar, unlike the Hialeah Race Course, consented to the presence of the CATV companies. If Hialeah Race Course had consented to the use of the press pass by Mrs. Satin, then Hialeah Race Course could not raise the defense of Mrs. Satin's trespass to establish the proper duty or standard of

care. Hialeah Race Course, however, did not consent to the use of the press pass by Mrs. Satin and, therefore, correctly claimed that her entry was unauthorized.

Finally, Petitioners' argument that they did not waive their "right to protect their property under the Fifth Amendment of the United States Constitution" is without merit. As this Court held in *West* v. *Chesapeake & Potomac Telephone Company,* 295 U. S. 662, 671 (1935), "neither Nation nor State may require the use of privately owned property without just compensation." Neither the Commonwealth of Kentucky nor the federal government (or any other governmental agency or entity) is a party to this litigation. "The just compensation and due process clauses are triggered only by governmental action." *New York, N. H. & H. R. Co., 1st Mtg. 4% B.C.* v. *United States,* 305 F. Supp. 1049, 1055 (S.D.N.Y. 1969). The conduct of which Petitioners complain is solely between private individuals and companies. There has been no governmental action, "taking" or otherwise, in this case. Therefore, Petitioners cannot transform an alleged "trespass" into a "taking" under the Fifth Amendment without some action by the federal, state or local government. In short, the Fifth Amendment considerations do not apply to a simple trespass case between private parties.

In sum, the foregoing demonstrates the sound reasoning and analysis by the Supreme Court of Kentucky in holding "that the general principles of estoppel apply here and that [Petitioners] are now estopped to contest respondent's use of the easement." *Michels* v.

Times Mirror Cable Television of Louisville, No. 86-SC-123-DG, Memorandum Opinion, p. 4 (Ky., Jan. 22, 1987).

3. The Exclusive Easements Are Apportionable For The Uses For Which The Easements Were Dedicated.

The courts across the nation have reached the same conclusion as the Kentucky Court of Appeals that CATV cables are facilities which are contemplated by public utility easements.

In *Jolliff* v. *Hardin Cable Television Co.,* 269 N. E. 2d 588 (Ohio 1971), the Ohio Court held that easements for electric and telephone utilities included the right to attach CATV lines to the utility poles in the easements, since such attachments imposed no greater burden than an additional line installed by the electric company. That logic applies here. The Petitioners amended their complaint three times before they accurately described the cable installed by the CATV companies on the poles in the easements. They were unable to locate the CATV wire among the telephone and electric wires on the poles! They can hardly complain that their burden was increased, when they could not even identify the cable in their pleadings.

In *White* v. *City of Ann Arbor,* 281 N. W. 2d 283 (Mich. 1979), the Michigan Court concluded that public utility easements included CATV service since that service was of a similar nature to other conventional utility services. No action for trespass was allowed because of attachment of CATV cables to utility poles in existing utility easements.

In *Hoffman* v. *Capitol Cablevision System, Inc.*, 383 N.Y.S. 2d 674 (N.Y. App. Div. 1976), the Court found that an easement for the distribution of electricity and messages was broad enough to include cable television, and ruled that the easement was exclusive to the utility companies, so it could be apportioned, allowing cable TV to be installed. *See Crowley* v. *New York Telephone Co.*, 363 N.Y.S. 2d 292 (N.Y. Dist. Ct. 1975); *Clark* v. *El Paso Cablevision, Inc.*, 475 S. W. 2d 575 (Tex. 1971).

In *Salvaty* v. *Falcon Cable Television*, 212 Cal. Rptr. 31 (Cal. App. 2 Dist. 1985), the Court likewise considered the question of whether CATV cable attached to surplus space on a utility pole was within the scope of an easement at the rear of residential property "for the stringing of telephone and electric light and power wires." The Court recognized that although CATV did not exist at the time of the granting of the easement, it is part of the natural evolution of communication technology and was thus consistent with the primary goal of the easement, to provide for wire transmission of power and communication. The Court also stated that it could not see how the addition of CATV to a pre-existing utility pole materially increased the burden on the appellants' property.

The *Salvaty* Court analyzed the case as turning on apportionability of the easement, following the rationale of the *Hoffman* case.

> Similarly here, the easement is exclusive vis-a-vis appellants, who clearly have no interest in providing utility services, and cannot interfere with the

> easement owner's facilities. *See, e.g., City of Los Angeles* v. *Igna* (1962) 208 Cal. App. 2d 338, 341, 25 Cal. Rptr. 247). "Though apportionability may be to the disadvantage of the possessor of the servient tenement, the fact that he is excluded from making the use authorized by the easement, plus the fact that apportionability increases the value of the easement to its owner, tends to the inference in the usual case that the easement was intended in its creation to be apportionable." (5 Rest., Property, § 493, subd. [c], p. 3054.)
>
> In holding that the easement could properly be apportioned to the cable company, the *Hoffman* court was further influenced by the fact that the cable equipment would not impose an additional burden on the servient tenement; was consistent with the policy of broadly interpreting easements to meet progressive inventions; and that cable television rendered a valuable education and public service.

Id. at p. 35.

The California Court held that the property owners' consent was not required to install the television cable.

In *Henley* v. *Continental Cablevision,* 692 S. W. 2d 825 (Mo. App. 1985), the Missouri Court of Appeals considered an action by residential property owners to have CATV cables removed from utility poles located in utility easements at the rear of their property. The Court found that the easements were easements in gross because their use was not granted to a person who owned adjacent land. The easements were found to be exclusive because the servient owners did not

retain the right to share the use of the poles. Since they were exclusive, the easements were apportionable. The Court's logic is irrefutable:

> We believe the very nature of the 1922 easements obtained by both utilities indicates that they were intended to be exclusive and therefore apportionable. It is well settled that where the servient owner retains the privilege of sharing the benefit conferred by the easement, it is said to be "common" or non-exclusive and therefore not subject to apportionment by the easement owner. *Conversely, if the rights granted are exclusive of the servient owners' participation therein, divided utilization of the rights granted are presumptively allowable. This principle stems from the concept that one who grants to another the right to use the grantor's land in a particular manner for a specified purpose but who retains no interest in exercising a similar right himself, sustains no loss if, within the specifications expressed in the grant, the use is shared by the grantee with others.* On the other hand, if the grantor intends to participate in the use or privilege granted, then his retained right may be diminished if the grantee shares his right with others. Thus, insofar as it relates to the apportionability of an easement in gross, the term "exclusive" refers to the exclusion of the owner and possessor of the servient tenement from participation in the rights granted, not to the number of different easements in and over the same land.
>
> Here, there is no claim that plaintiffs' predecessors had at the time the easements were granted, any intention to seek authority for, or any interest

> whatsoever in using the five foot strips for the construction and maintenance of either an electric power system or telephone and telegraphic service. Moreover, at no time during the ensuing sixty-three years have the trustees been authorized to furnish such services by any certificate of convenience and necessity issued by the Public Service Commission pursuant to §§ 392.260 and 393.170, RSMo. 1978. Accordingly, the easements granted to Southwestern Bell and Union Electric were exclusive as to the grantors thereof and therefore apportionable.

692 S. W. 2d at pp. 827-828 (emphasis added; citations omitted in part).

The foregoing logic applies here. The easements are not "appurtenant" to other real property. The utility easements allow the utilities to construct poles and attach wires. The property owners retain no such right. The easements are, therefore, for the exclusive use of the utility companies. As exclusive easements, the utilities have the right to apportion those easements, and permit attachment of CATV lines. The Kentucky Court of Appeals correctly decided that the easements in this case were apportionable.

Finally, Petitioners' reliance on *Loretto* v. *Teleprompter Manhattan CATV Corp.,* 458 U. S. 419 (1982) is misplaced. Unlike the present appeal, there was no easement of any kind involved in *Loretto.* Here, easements of record exist; the CATV cable equipment is within the scope of these easements. The easements are apportionable for the use and occupation of CATV cable.

4. The Occupation And Use Of The Easements By CATV Cable Is Similar In Nature And Purpose To The Occupation And Use Of The Easements By The Other Utilities.

The occupation and use of the easements by CATV is similar in nature and purpose to the occupation and use of the easements by the other utilities. These exclusive easements, therefore, are apportionable. *See, e.g. Henley* v. *Continental Cablevision,* 692 S. W. 2d 825 (Mo. App. 1985).

The issue for determining whether the exclusive easements are apportionable is the similarity of the occupation and use of the easements by the CATV operators not whether CATV operators are statutorily defined "utilities."

In *City of Owensboro* v. *Top Vision Cable Co. of Ky.,* 487 S. W. 2d 283 (Ky. 1973), *cert. denied,* 411 U. S. 948 (1973), the Kentucky Court of Appeals, then the highest state court of review, considered whether a city could require a CATV company whose lines attached to utility poles in utility easements, to be subject to a city utility franchise. The Kentucky Court held:

> It cannot be denied that television is an integral part of American life. It possesses many of the attributes of a public utility. It is of a public nature.

Id. at p. 287.

In sum, although the CATV respondents are not jurisdictional "utilities" as defined in KRS 278.010(3)

for purposes of regulation by the Kentucky Public Service Commission, the Kentucky courts have recognized that CATV operators and the service they provide have the "attributes of a public utility." *Id.* The CATV cable has the attributes of cable strung by South Central Bell and LG&E. The CATV cable occupies and uses the easements in a similar, if not identical, manner as the cable of LG&E and SCB.

Further, in *Cumberland Telephone and Telegraph Co.* v. *Avritt,* 85 S. W. 204 (Ky. 1905), the Kentucky Court observed that evolution in technology required the use of the easements by methods of communication not envisioned at the time of the original easement:

> The transmission of messages by telephone is a business of a public character, which is conducted under public control in the same manner as the carriage of persons or property. The easement of the public is not limited to the particular methods of use in vogue when the easement is acquired, but includes improved methods which the progress of society finds necessary for business.

Id. at p. 204. Thus the Kentucky Court of Appeals recognized the necessity of viewing easements in keeping with the evolution of technology in 1905. The same is true today.

In sum, the Kentucky courts have correctly addressed this issue twice and have articulated a public policy which recognizes the need to construe easements to permit new technology and services for societal purposes.

CONCLUSION

For the reasons set forth above, Louisville Gas and Electric Company requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Louisville Gas and Electric Company

CERTIFICATE

It is hereby certified that, on this 28th day of July, 1987, three copies of the within Brief in Opposition of Louisville Gas and Electric Company were served by United States mail, postage prepaid, on Nicholas W. Carlin, Esq., 911 Kentucky Home Life Building, Louisville, Kentucky 40202, Counsel for Petitioners; Laurence J. Zielke, Esq. and Michael W. Lowe, Esq., Pedley, Ross, Zielke & Gordinier, 450 South 3rd Street, Louisville, Kentucky 40202, Counsel for Storer Communications of Jefferson County, Inc.; Marvin J. Hirn, Esq., and John Selent, Esq., 2450 Meidinger Tower, Louisville, Kentucky 40202, Counsel for Times Mirror Cable Television of Louisville, Inc.; James G. Harralson, Esq., Solicitor, South Central Bell Telephone Company, 601 West Chestnut Street, P. O. Box 32410, Louisville, Kentucky 40232, Counsel for South Central Bell Telephone Company.

JOHN W. BILBY

Counsel for Respondent, Louisville Gas and Electric Company

APPENDIX

APPENDIX

APPENDIX A

JEFFERSON CIRCUIT COURT

DIVISION ELEVEN

No. 83 CI 07641

FREDRIC E. MICHELS, Et Al. - - - *Plaintiffs*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC., Et Al. - - - - *Defendants*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This case is presently before the Court on the plaintiff's complaint against multiple defendants. The plaintiff's claim that the aerial coaxial cable installed within public utility easements on their private property is a continuing trespass to real property justifying compensatory and punitive damages.

~~The Michels~~ claim the trespass occurred on their private-residential property located at 3117 Dell Brooke. The residence was purchased in 1976 and has since been sold. The Michels were subscribers to cable television, and permitted Times-Mirror employees to come on their property to install equipment for cable television services. They signed an agreement with Times-Mirror as part of their application for service. That agreement authorized free access to the premises for installation and service of equipment. The only cable equipment on their property was the dropline connecting the service to the residence and the aerial coaxial cable hung within a public utility easement. The Michels have demonstrated no diminished use of their

real property and no injury to tree limbs or shrubs done by Times-Mirror.

The Kleins claim the trespass occurs continually at their present residence on Woodfill Way. The Kleins were subscribers to cable television previously and continued subscription to cable television at Woodfill Way. Like the Michels, the Kleins are cable subscribers who have signed an agreement with Times-Mirror permitting access for installation and maintenance of cable equipment. They also have not contested the dropline that links their residence to the aerial coaxial cable that is hung within a public utility easement on their property. They claim trespass on land by the aerial coaxial cable and seek compensatory damages, not injunctive relief. In fact, the Kleins do not want the cable removed and plan to continue cable television services. They have demonstrated no injury to their realty or its use by the presence of the cable.

CONCLUSIONS OF LAW

To prevail on the merits, the plaintiffs must demonstrate a trespass to their private real property and injury to the property's use or value.

The Michels no longer live at 3117 Dell Brooke. There was no demonstrated injury to their property by the presence of the cable. There is no continuing trespass as the couple no longer reside at the location. Their claim is rendered moot and therefore unable to be sustained in this action.

The Kleins' claim of continuing trespass is likewise unable to stand on the merits. The law in Kentucky is that "[a] trespasser is a person who enters or remains upon the land in the possession of another without the possessor's consent." *Bradford* v. *Clifton*, 379 S. W. 2d 249, 250 (Ky. 1964). Further, consent need not be explicit but can be implied by the circumstances. Implied consent may be

found as a matter of law where habitual use of property for a particular purpose existed with the knowledge of the owner and without the owner's objection. *Id.* There has clearly been a habitual and obvious use of the public utility easement by the Times-Mirror cable without objection by the Kleins other than the present action. In addition, the undisputed subscriber agreement and desire to continue subscriber services logically give rise to the implication of consent to the coaxial cable which enables the provision of subscriber services to the Kleins. Where the Kleins have, by implication, consented and continue to consent to the presence of the cable, their claim can not be sustained in this action.

As neither the Michels or Kleins have standing to continue their respective claims against Times-Mirror for trespass, so must their derivative claims against the co-defendants fail on the merits.

ORDER

This matter comes before the Court on the multiple defendants' motions for summary judgment, pursuant to CR 56. As there is no genuine issue of material fact as regards either plaintiff, the Court grants summary judgment as a matter of law and hereby orders the claims of both plaintiffs dismissed.

(s) Olga S. Peers
Olga S. Peers, Judge

Date: 2/19/85

cc: All Counsel

Entered in Court: February 19, 1985

JEFFERSON CIRCUIT COURT

DIVISION ELEVEN

No. 83 CI 07641

FREDRIC E. MICHELS, Et Al. - - - - *Plaintiffs*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC., Et Al. - - - - *Defendants*

AMENDED ORDER

The Court having entered an Order granting summary judgment and ordering the claims of both plaintiffs dismissed in the above action on this date, now amends that Order by inserting a final paragraph to read as follows:

"This is a final and appealable Order."

(s) Olga S. Peers
Olga S. Peers, Judge

Date: 2/19/85

cc: All Counsel

Entered in Court: February 19, 1985

JEFFERSON CIRCUIT COURT

DIVISION ELEVEN

No. 83 CI 07641

FREDRIC MICHELS, Et Al. - - - - *Plaintiffs*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC., Et Al. - - - - *Defendants*

SECOND AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Court having entered an Order granting summary judgment and ordering the claims of the Plaintiffs Michels and Kleins dismissed in the above action, and having amended said Order, all on the 19th day of February, 1985, and the Court now desiring to amend its Order to finally clarify its judgment and intent, now issues the following Second Amended Findings of Fact, Conclusions of Law, and Order.

This case is presently before the Court on the Plaintiffs' Complaint against multiple Defendants. The Plaintiffs claim that the aerial coaxial cable installed within public utility easements on their private property is a continuing trespass to real property justifying compensatory and punitive damages.

The Michels claim the trespass occurred on their private-residential property located at 3117 Dell Brooke. The residence was purchased in 1976 and has since been sold. The Michels were subscribers to cable television, and permitted Times-Mirror employees to come on their property to install equipment for cable television services. They

signed an agreement with Times-Mirror as part of their application for service. That agreement authorized free access to the premises for installation and service of equipment. The only cable equipment on their property was the dropline connecting the service to the residence and the aerial coaxial cable hung within a public utility easement. The Michels have demonstrated no diminished use of their real property and no injury to tree limbs or shrubs done by Times-Mirror.

The Kleins claim the trespass occurs continually at their present residence on Woodfill Way. The Kleins were subscribers to cable television previously and continued subscription to cable television at Woodfill Way. Like the Michels, the Kleins are cable subscribers who have signed an agreement with Times-Mirror permitting access for installation and maintenance of cable equipment. They also have not contested the dropline that links their residence to the aerial coaxial cable that is hung within a public utility easement on their property. They claim trespass on land by the aerial coaxial cable and seek compensatory damages, no injunctive relief. In fact, the Kleins do not want the cable removed and plan to continue cable television services. They have demonstrated no injury to the realty or its use by the presence of the cable. The Receveurs claim the trespass occurs continually at their residence at 11 Narwood Drive. The Receveurs were subscribers to cable television, and permitted Storer employees to come on their property to install equipment for cable television services. The Receveurs are presently cable subscribers who have signed an agreement with Storer permitting access to the premises for installation and service of equipment. The Receveurs do not want the cable removed and plan to continue to receive cable television services. They do not contest the dropline that links their residence to the aerial coaxial cable that is hung within a public utility easement

on their property. They claim trespass on land by the aerial coaxial cable and seek compensatory damages, not injunctive relief. The Receveurs have demonstrated no diminished use of their real property and no injury to their realty, tree limbs or shrubs done by Storer.

The Thurmans claim the trespass occurs continuously at their present residence at 6207 Bay Pine Drive. The Thurmans were subscribers to cable television and like the Receveurs, have signed an agreement with Storer permitting access for installation and maintenance of cable equipment. They have not contested the dropline that links the residence to the aerial coaxial cable nor do they have any objections to the aerial coaxial cable because they admit it is necessary for them to receive cable television services. They claim trespass on land by a down guy and anchor placed within a public utility easement on their property and seek compensatory damages, not injunctive relief. The Thurmans do not wish to have cable television removed from their home and plan to continue to receive cable television services. They have demonstrated no injury to their realty or its use by the presence of the Storer down guy and anchor.

CONCLUSIONS OF LAW

To prevail on the merits, the Plaintiffs must demonstrate a trespass to their private real property and injury to the property's use or value.

The Michels no longer live at 3117 Dell Brooke. There was no demonstrated injury to their property by the presence of the cable. There is no continuing trespass as the couple no longer reside at the location. Their claim is rendered moot and therefore unable to be sustained in this action.

The claims of continuing trespass by the Kleins, the Receveurs, and the Thurmans are likewise unable to stand

on the merits. The law in Kentucky is that "[a] trespasser is a person who enters or remains upon the land in the possession of another without the possessor's consent." *Bradford* v. *Clifton,* 379 S. W. 2d 249, 250 (Ky. 1964). Further, consent need not be explicit but can be implied by the circumstances. Implied consent may be found as a matter of law where habitual use of property for a particular purpose existed with the knowledge of the owner and without the owner's objection. *Id.* There has clearly been a habitual and obvious use of the public utility easements over the property of the Kleins, the Receveurs, and the Thurmans, by Times-Mirror cable or by Storer cable and equipment without objection by the Kleins or by the Receveurs or Thurmans other than the present action. In addition, the undisputed subscriber agreements signed by the Kleins, the Receveurs, and the Thurmans, and their desire to continue subscriber services logically give rise to the implication of consent to the coaxial cable and cable television equipment which enables the provision of subscriber services to the Kleins, the Receveurs, and the Thurmans. Where the Kleins, the Receveurs, and the Thurmans, have, by implication, consented and continued to consent to the presence of the cable, their claim cannot be sustained in this action.

As none of the Plaintiffs, including the Michels, the Kleins, the Receveurs, and the Thurmans, have standing to continue their respective claims against Times-Mirror or against Storer for trespass, so must their derivative claims against the co-Defendants, Louisville Gas & Electric Company and South Central Bell Telephone Company, fail on the merits.

ORDER

This matter comes before the Court on the multiple Defendants' motions for summary judgment, pursuant to

Civil Rule 56. As there is no genuine issue of material fact as regards any of the Plaintiffs, the Court grants summary judgment as a matter of law and hereby orders the claims of all Plaintiffs dismissed.

This is a final and appealable Order.

(s) Olga S. Peers
Olga S. Peers, Judge

Date Entered: February 25, 1985

cc: All Counsel

APPENDIX B

COURT OF APPEALS OF KENTUCKY

OPINION RENDERED: JANUARY 31, 1986; 3:00 P.M.
TO BE PUBLISHED

No. 85-CA-1081-MR

FREDRIC E. and ADRIAN MICHELS;
ROBERT and TERESA KLEIN;
RICHARD and PAMELA RECEVEUR; and
McKINLEY and WILMA THURMAN - - *Appellants*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.;
STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.;
LOUISVILLE GAS AND ELECTRIC COMPANY; and
SOUTH CENTRAL BELL TELEPHONE COMPANY - *Appellees*

Appeal From Jefferson Circuit Court
Honorable Olga Peers, Judge
Action No. 83-CI-07641

AFFIRMING

BEFORE: HOWARD, LESTER and MILLER, Judges.

MILLER, JUDGE. Appellants are residence owners in Jefferson County, Kentucky. Appellees are two cable television companies and two utility companies. The question arises whether cablevision companies, relatively new enterprises, may string their coaxial cables along and across lands by way of traditional utility easements. The use is made with the consent of the other users of the easement—

Louisville Gas and Electric Company and South Central Bell Telephone Company. The question is of considerable significance as many of the utility easements predate the advent of community antenna television (CATV). It is therefore arguable the use of the easement in furtherance of the CATV enterprise, a function not contemplated when the easement was established, is impermissible and consequently a trespass against the owner of the servient estate.

The easements in question, appearing in subdivision plats and deeds of dedication, are as follow:

> The Michels easement reads, "the spaces outlined by dotted lines and marked electric and telephone easements or street lighting easements are hereby reserved for easements for electric and telephone utility purposes. . . .
>
> The Receveur easement reads, "An easement for public utility purposes is hereby reserved on, over, under and within the strips and spaces upon this plan defined and bounded by broken lines and marked 'public utility easement' including the right of the utility companies to remove and trim trees on said easement. . . ."
>
> The Thurman easement reads, "The spaces outlined by dashed lines and marked 'electric and telephone easement' are hereby reserved as easements for electric and telephone utility purposes, which include: (1) . . . ."
>
> The Klein easement reads, ". . . five foot easement is retained across the rear of each lot for public utility purposes."

Appellants filed their action in trespass and sought to certify as a class all residents of Louisville and Jefferson County similarly situated. CR 23. On defendants' motion, the trial court granted summary judgment before addressing the class action issue. In defense of appellants' claim,

the appellee CATV companies maintained they were entitled to apportioned use of the easement. They variously interposed the defenses of consent, waiver and estoppel based on language in the service contract each subscriber of cable television was required to sign. At least one appellee contended federal law preempted the field and that utility easements, in the nature of those in question, are subjected to CATV usage. U. S. Const., article VI, clause 2; and 47 U.S.C. 541. While we do not find it necessary to address this contention, it is of significant interest and may require determination were the easements not of the type under consideration.

All appellants have subscribed to cable television at one time or another in the past, and at least one appellant indicated he would continue to subscribe to cable television whatever the outcome of this litigation. The trial court's summary judgment was based upon a finding that appellants had impliedly consented to the installation of the aerial coaxial cable. The trial court found consent from the failure of appellants to contest the dropline which runs from the coaxial cable to their respective residences coupled with the agreement each had signed with the cable companies granting its employees free access to their property to install and service cable equipment. The court also ruled that appellants had not demonstrated that they had been injured. We decline to review the soundness of the trial court's rationale for granting summary judgment, but nevertheless affirm the decision under the rule which compels us to do so when the proper result has been reached. *See Kessee* v. *Smith,* 289 Ky. 609, 159 S. W. 2d 56 (1941). It is our view that the easements in question are susceptible to apportionment to CATV usage. This is true notwithstanding some of the easements identify particular utilities such as telephone and electricity. They are standard easements found throughout this Commonwealth incident to

subdivision development. They are not easements appurtenant (*see Buck Creek R.R. Co.* v. *Haws,* 253 Ky. 203, 69 S. W. 2d 333 [1934]), but are in gross because the benefit of the easement does not inure to any specific real property owned by either appellee utility company. *See Inter-County Rural Elec. Coop. Corp.* v. *Reeves,* 294 Ky. 458, 171 S. W. 2d 978 (1943). As easements in gross, we believe they are particularly susceptible to apportionment and consequently available for the use of utilities in general. The CATV industry is a business of public nature having many of the attributes of public utilities. See *City of Owensboro* v. *Top Vision Cable Company of Kentucky,* Ky., 487 S. W. 2d 283 (1972). We conclude CATV is in fact a public utility within contemplation of the easements in question. A public utility is defined in Black's Law Dictionary (5th Ed.) as follows:

> PUBLIC UTILITY. . . . . Any agency, instrumentality, business industry or service which is used or conducted in such manner as to affect the community at large, that is which is not limited or restricted to any particular class of the community. [Citations omitted.] The test for determining if a concern is a public utility is whether it has held itself out as ready, able and willing to serve the public.
>
> . . . .

We do not find the CATV industry is deprived of its status simply because utility regulatory agencies of the federal and state governments have, in some way, declined to regulate. 47 U.S.C. 541(c); KRS 278.010(4)(5) and .040. We find it has long been a policy in this state that the type of easement in question is not limited to a particular method of use, but are susceptible to uses of contemporary technology. *See Cumberland Tel. & Tel. Co.* v. *Avritt,* 120 Ky. 34, 85 S. W. 204 (1905). We do not discern a valid

distinction between the apportionment of an easement to accommodate new technology and apportionment to accommodate a new and different innovation conforming to the definition of a utility and adapted to the ordinary ends of same. Indeed, it seems utility easements in the nature of those at hand have as their purpose the accommodation of all similar utilities. It cannot reasonably be assumed that a subdivision development would dedicate land to utility use with a limitation upon the type of service to be rendered. In this regard, we believe the identification of utilities, such as electric and telephone, was not intended to exclude those utilities requiring compatible installations such as CATV. Generally, we think it is not the function of the utility, but rather the physical nature of its installations which determines whether it conforms to the easement grant. The fact is, the apportioned use of the easements by the CATV companies places no additional burdens upon the appellants as owners of the servient estates. In absence of additional servitude, there can be, of course, no trespass.

Other jurisdictions which have addressed the issue have reached a similar result. *See Salvaty* v. *Falcon Cable Tel.*, — Cal. App. 3d Supp. —, 212 Cal. Rptr. 31 (Cal. App., 2 Dist. 1985); *White* v. *City of Ann Arbor,* 406 Mich. 554, 281 N.W. 2d 283 (1979); *Staminski* v. *Rimeo,* 62 Misc. 2d 1051, 310 N.Y.S. 2d 169 (1970); *Clark* v. *El Paso Cablevision, Inc.,* 475 S.W. 2d 575 (Tex. Civ. App. 1971). Appellants' heavy reliance upon *Loretto* v. *Teleprompter Manhattan CATV Corp.,* 458 U. S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) is misplaced. In *Loretto,* the State of New York had passed a statute which dictated that a landlord must permit cable television companies to install cable facilities upon his property. The landlord was to be compensated at a sum fixed by a state commission. The case did not involve an interpretation of easement law. The Court concluded that the state authorization of the installa-

tion of cable equipment in the manner prescribed constituted an unauthorized taking of property within the meaning of the fifth amendment. Therefore, the statute was held void.

Finally, upon careful analysis of the myriad facts and details contained in the record before us, we must conclude that the apportioned use of the traditional utility easements at hand lies not only within the direct scope and purpose of the easement, but is well supported by authority as to the manner and use of easements. *See generally,* 25 Am. Jur. 2d *Easements and Licenses,* § 72 et seq. (1966).

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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APPENDIX C

RENDERED: JANUARY 22, 1987
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

No. 86-SC-123-DG

FREDRIC E. MICHELS, ADRIAN MICHELS,
ROBERT KLEIN, TERESA KLEIN,
RICHARD RECEVEUR, PAMELA RECEVEUR,
MCKINLEY THURMAN, and WILMA THURMAN - *Movants*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.;
STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.;
LOUISVILLE GAS AND ELECTRIC COMPANY; and
SOUTH CENTRAL BELL TELEPHONE COMPANY - *Respondents*

On Review from Court of Appeals
No. 85-CA-1081-MR
(Jefferson Circuit Court No. 83-CI-07641)

MEMORANDUM OPINION OF THE COURT AFFIRMING

The residential property of each of the movants is encumbered by dedication on the subdivision plats or by deeds of dedication with easements for public utility purposes or for electric and telephone service. The respondents, Louisville Gas and Electric Company and South Central Bell Telephone Company have used these easements for the purpose of installing and maintaining electric and tele-

phone service to customers. These utility companies have permitted the respondents, Times Mirror Cable Television of Louisville, Inc. and Storer Communications of Jefferson County, Inc. to install and maintain an aerial coaxial television cable upon utility poles within the confines of the easements.

There is presently extending across the real property owned by each of the movants upon utility poles within the confines of the easements an aerial coaxial television cable. Each of the movants subscribed to the television cable service, signed an agreement with the cable companies granting their employees access to the property to install and service cable equipment, allowed the cable to remain in place without objection for a substantial period of time, and permitted the installation of a drop line across their property to connect their residences to the coaxial cable.

Each of the movants contend that the easement upon their property was granted for electric and telephone service or for public utility purposes and that the coaxial television cable does not qualify as a beneficiary under the terms of the easement. They contend, therefore, that the television cable constitutes a continuing trespass upon their private property for which they are entitled to damages.

Summary judgment was granted by the trial court to each of the respondents on the ground that the issue was moot as to the movants Michels, and that there was no trespass with respect to the other movants because they impliedly consented to the installation and maintenance of the cable.

The Court of Appeals affirmed the judgment of the trial court, but for a different reason than that given by the trial court, and expressed no opinion on the rationale for the judgment given by the trial court. The Court of Appeals held that the particular easements in question were susceptible to apportionment to television cable usage, al-

though the instruments creating the easement contained no express language permitting use by television cables.

This court likewise affirms the judgment. We decline, however, to review the question of the apportionability of the easements involved in this case.

A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise. *Restatement of the Law,* Torts 2d, § 329.

Habitual or customary use of property for a particular purpose, without objection from the owner or occupant, may give rise to an implication of consent to such use to the extent that the users have the status of licensees, where such habitual use has existed to the knowledge of the owner and has been accepted or acquiesced in by him. *Bradford* v. *Clifton,* Ky., 379 S. W. 2d 249 (1964).

Consent may be manifested by silence or inaction, and even when there is in fact no consent, the words or actions or inactions of an owner or occupant may, under some circumstances, manifest an apparent consent such as will justify reliance on the apparent consent. *Restatement of the Law,* Torts 2d, § 892, Comments (a) and (c).

We think it is clear that the movants had no objection to the installation of the cable television equipment when it was installed upon the utility poles within the confines of the easement. They signed an agreement permitting the employees of the cable companies access to their property for the installation and maintenance of the cable equipment, and they further agreed that the cable companies might install an aerial drop line across their property outside the confines of the easement to connect the coaxial cable to their residences.

There are circumstances in which consent becomes irrevocable. *Restatement (Second) Torts,* § 892A(5) (1979). We hold that the general principles of estoppel apply here

and that movants are now estopped to contest respondents' use of the easement.

Because the issues in this case can be decided on the consent of the movants, it is unnecessary to discuss the broader question of the apportionability of the easement to cable television usage.

We find no error in the other matters asserted by movants.

The judgment is affirmed.

Stephens, C.J.; Gant; Stephenson; and Lambert, J.J. concur.

Leibson, J., concurs by separate attached opinion. Wintersheimer, J., dissents by separate attached opinion. Vance, J., not sitting.

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SUPREME COURT OF KENTUCKY

RENDERED: JANUARY 22, 1987
NOT TO BE PUBLISHED

86-SC-123-DG

FREDRIC E. MICHELS, ADRIAN MICHELS,
ROBERT KLEIN, TERESA KLEIN,
RICHARD RECEVEUR, PAMELA RECEVEUR,
MCKINLEY THURMAN, and WILMA THURMAN - *Movants*

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.;
STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.;
LOUISVILLE GAS AND ELECTRIC COMPANY; and
SOUTH CENTRAL BELL TELEPHONE COMPANY - *Respondents*

On Review from Court of Appeals
No. 85-CA-1081-MR
(Jefferson Circuit Court No. 83-CI-07641)

CONCURRING OPINION BY JUSTICE LEIBSON

I concur in results only.

If there were a continuing trespass, I would have some difficulty with the concept of estoppel.

However, I agree with the Court of Appeals that CATV is in fact a public utility within the contemplation of the easements in question, and that the CATV industry is not deprived of its status simply because utility regulatory agencies of the federal and state governments have declined to regulate it. 47 U.S.C. 541(c); KRS 278.010(4)(5) and .040.

In each of the cases presently involved, the existing public utility easement was sufficient to permit apportionment to accommodate new technology. The apportioned use of the easements by the CATV companies places upon the appellants as owners of the servient estates no additional burdens which should be considered beyond the contemplation of the easements in question.

SUPREME COURT OF KENTUCKY

RENDERED: JANUARY 22, 1987
NOT TO BE PUBLISHED

86-SC-123-DG

FREDRIC E. MICHELS, ADRIAN MICHELS,
ROBERT KLEIN, TERESA KLEIN,
RICHARD RECEVEUR, PAMELA RECEVEUR,
MCKINLEY THURMAN and WILMA THURMAN - *Appellants*

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.;
STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.;
LOUISVILLE GAS AND ELECTRIC COMPANY; and
SOUTH CENTRAL BELL TELEPHONE CO. - - *Appellees*

On Review from Court of Appeals
No. 85-CA-1081-MR
(Jefferson Circuit Court No. 83-CI-07641)

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I respectfully dissent.

It is my view that informed consent is a necessary element of the doctrine of equitable estoppel. In my opinion, a person will not be estopped by his acts unless he understands his rights or actively participates or silently acquiesces in conditions operating to deprive him of his rights. Consent, when given, must be with full knowledge of the facts and rights affected. *See Trimble* v. *King*, 131 Ky. 1, 114 S. W. 317 (1908).

Waiver exists only where a party with full knowledge of the material facts does or forbears to do something inconsistent with that right and indicates that knowledge of the existence of the right is a prerequisite to such relinquishment. No one can waive a right which he does not know. *Harris Bros. Construction Co.* v. *Crider,* Ky., 497 S. W. 2d 731 (1973).

The party asserting estoppel must be excusably ignorant of the true facts and change his position to his detriment in reliance on the words or conduct of the other party. *See City of Georgetown* v. *Mulberry,* Ky., 485 S. W. 2d 503 (1972). That case indicates that where there is a duty to speak or act, silence and inaction are factors to be considered. The cable companies had a duty to seek permission from the property owners and their predecessors. It is not clear that any reason exists for them to ignore that duty.

Estoppel was developed to protect rights and not to reward wrongdoers, even if the wrongdoers are innocent of evil intent. *Sueskind* v. *Michael Hardware,* 228 Ky. 780, 15 S. W. 2d 529 (1929). The cable companies had superior knowledge of their legal obligations and duties to obtain permission for use of the easements. They had a duty to disclose to the property owners, and they knew it, as demonstrated in the license agreements between LG&E and Bell Telephone. It would appear that they willfully failed to disclose or seek permission or easement rights from the property owners.

It appears that both cable companies did not change their positions or any of their operating procedures throughout the Louisville and Jefferson County area. Objection by other owners never caused the companies to clarify their legal responsibilities to anyone. It seems unlikely that objections by these landowners would have changed the companies' policies and approach to installation.

In addition in this case, the Public Service Commission, along with LG&E and Bell Telephone, allowed the cable companies to enter licensing agreements with the utility companies for the use of their poles only with the requirement that the cable companies would obtain any permission or easements necessary from landowners. The cable companies entered on the property knowing that they had acquired a right to use the utility poles only and did not have the authority without permission to use the easement. They should not be able to now claim protection by virtue of estoppel.

The argument that because the property owner subscribes to cable TV he has no right to object to the trespass by the cable companies is without merit. Most property owners desire electricity more than they desire cable, but it is widely recognized that electric utilities must obtain either easement rights by condemnation or permission from the property owners involved. In that instance there is permission granted and if agreed, a payment for the easement right by the electric company to the landowner and continuing monthly payments by the landowner to the utility for electric services. This is an orderly, proper and commonly understood practice. The same should apply here. The landowner was not consulted by either the telephone utility or the cable company about his right to refuse to permit a cable guywire on his property. The license agreement required the cable company to obtain an appropriate easement but that licensed document was not published. Consequently the telephone utility had superior knowledge and a duty to disclose this information to the property owners. This duty arose from its easement.

The guywire on the property was visible, but the legal obligations and weaknesses of the cable company were not. The failure of the telephone company to disclose to the public, including the property owners, his right to refuse

or to permit the guywire and any other cable distribution equipment could be considered to be fraudulent concealment and if that is the case, it negates the defenses of consent, estoppel and waiver.

Reliance on *Bradford* v. *Clifton*, Ky., 379 S. W. 2d 249 (1964) is misplaced. The facts in *Bradford, supra,* are not comparable and the case does not hold that one who has consent for a prior use has consent for new uses. It says only that habitual or customary use of property for a particular purpose without objection from the owner or occupant may give rise to an implication of consent to such use. That does not extend to new uses and new users.

Summary judgment as granted by the trial court is not appropriate in this situation. I would reverse both the Court of Appeals and the trial court.